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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1808

GENERAL INSURANCE COMPANY OF AMERICA,
Petitioner.

VERSUS

OKLAHOMA CITY HOUSING AUTHORITY, ET AL.,
Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT**

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**PETITION FOR WRIT OF CERTIORARI TO THE
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TENTH CIRCUIT**

The petitioner, General Insurance Company of America, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on January 13, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in *Globe Const. Co. v. Oklahoma City Housing Authority*, 571 F.2d 1140 (10th Cir. 1978), and appears in the Appendix hereto (App. A-1). The opinion of the United States District Court for the Western District of Oklahoma in Cause No. CIV-73-641-C rendered on April 30, 1975 is unreported and appears in the Appendix hereto (App. A-9).

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on January 13, 1978. A timely petition for rehearing *en banc* was denied on March 23, 1978, and this petition for writ of certiorari was filed within 90 days of that date. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the exclusive jurisdiction granted a federal bankruptcy court in a Chapter XI reorganization proceeding by Section 311 of the Bankruptcy Act, 11 U.S.C.A. § 711 (1970), extends to contract balances in the possession of a third party claiming ownership to the funds.
2. Whether a federal district court has jurisdiction to determine the liability of a bankrupt for a debt in an action collateral to a Chapter XI proceeding brought by a creditor against the surety of such bankrupt.
3. Whether a surety may be denied credit for the completed work of the contractor against its liability on a performance bond because of the purported fraud of the contractor.
4. Whether Fed. R. Civ. P. 15(b) permits a party to amend its pleadings at trial and immediately introduce evidence on the new issue when no prior notice or opportunity to prepare a defense is provided to the opposing party.

5. Whether the following issues are questions of law or questions of fact under applicable Oklahoma law:

- a. Whether a completing owner may recover liquidated delay damages after terminating the contractor;
- b. Whether fraud can be proven without evidence of reliance upon misrepresentations or of resulting injury; and
- c. Whether an Oklahoma statute permits the awarding of attorney fees for parties against whom no claims were made by the party ordered to pay the fees.

STATUTORY PROVISIONS INVOLVED

AMEND. 14, U. S. CONSTITUTION:

“ * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * * ”

BANKRUPTCY ACT, SECTION 16, 11 U.S.C.A. § 34 (1970):

“The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.”

BANKRUPTCY ACT, SECTION 311, 11 U.S.C.A. § 711 (1970):

“Where not inconsistent with the provisions of this chapter, the court in which the petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located.”

**BANKRUPTCY ACT, SECTION 314, 11 U.S.C.A. § 714
(1970):**

"The court may, in addition to the relief provided by section 29 of this title and elsewhere under this chapter, enjoin or stay until final decree the commencement or continuation of suits other than suits to enforce liens upon the property of a debtor, and may, upon notice and for cause shown, enjoin or stay until final decree any act or the commencement or continuation of any proceeding to enforce any lien upon the property of a debtor."

BANKRUPTCY RULE 11-44a:

"(a) *Stay of Actions and Lien Enforcement.* A petition filed under Rule 11-6 or 11-7 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor, or the enforcement of any judgment against him, or of any act or the commencement or continuation of any court proceeding to enforce any lien against his property, or of any court proceeding, except a case pending under Chapter 10 of this title, for the purpose of the rehabilitation of the debtor or the liquidation of his estate."

RULE 15(b), FED. R. CIV. P.:

"(b) *Amendments to Conform to the Evidence.* When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at

the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

12 OKLA. STAT. § 936 (1971):

"In any civil action to recover on an open account, a statement of account, account stated, note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, unless otherwise provided by law or the contract which is the subject of the action, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs."

STATEMENT OF THE CASE

Petitioner, General Insurance Company of America ("General"), seeks a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") from a decision affirming the judgment of the Honorable Stephen S. Chandler, Judge for the United States District Court for the Western District of Oklahoma ("Oklahoma District Court"). Judgment was rendered by the Oklahoma District Court against General upon the counterclaim of the defendant-respondent, Oklahoma City Housing Authority ("OCHA"), a public corporate body. The judgment was entered on the performance bond issued to OCHA by General as the surety of the plaintiff, Globe

Construction Co. ("Globe"), a general contractor and a Colorado corporation. The judgment against General included an award to OCHA for the attorney fees of George Seminoff, Wayne W. Bowman, and Albert W. Bode, partners doing business as Seminoff-Bowman-Bode ("Architects") that had been joined as Third-Party Defendants by OCHA.

Globe was awarded a public construction contract by OCHA which terminated the contract when the construction was more than ninety per cent completed. Globe filed this action in the Oklahoma District Court, based upon the diversity of citizenship of the parties and the amount in controversy pursuant to 28 U.S.C. § 1331 (1970). Globe sought to recover approximately \$400,000.00 in contract balances owing at the time of the termination. The contract balances included \$195,092.66 retained under the provisions of the contract that permitted OCHA to withhold ten per cent of all progress payments until the construction was completed. OCHA counterclaimed against Globe seeking liquidated damages provided by the contract, its costs incurred in completing the project, and attorney fees. Less than thirty days prior to trial, OCHA amended its counterclaim to join General as a counterclaim defendant based upon its obligations under the performance bond. OCHA also named the Architects as third-party defendants seeking indemnity from the claims made by Globe.

The mere statement of the chronology of proceedings below will demonstrate the denial of due process to General and the confusion that currently exists among the federal courts regarding the conflicting jurisdiction of the

bankruptcy court to other federal courts in pending collateral proceedings.

On July 30, 1974, the trial of Globe's complaint and OCHA's counterclaim commenced. In opening statement, and without previous notice or allegation, OCHA's attorney declared his intent to prove the commission of fraud by Globe. Over the objections of Globe and General, the trial court denied a request for continuance. The first trial session continued until August 2, 1974. On August 1, 1974, the trial court made a "preliminary finding of fraud." The cause was continued until October 1, 1974.

On September 15, 1974, Globe's chief trial counsel, a California lawyer, withdrew without leave of court. On October 1, 1974, Globe's local (Oklahoma) counsel requested leave to withdraw. The withdrawal was permitted on October 2, and the trial proceeded with Globe's President in attendance (except for October 3) without the assistance of any counsel. The President of Globe was not permitted to cross-examine witnesses. The Oklahoma District Court also denied General's motion for dismissal, since its performance bond did not insure against fraud.

On October 3, 1974, Globe filed a petition for a Chapter XI bankruptcy reorganization in the United States District Court for the District of Colorado ("Colorado District Court"). The petition was assigned to a referee in bankruptcy ("Bankruptcy Court"). On the schedule of assets subsequently filed in the bankruptcy proceedings, Globe listed OCHA as being indebted to Globe in the amount of \$601,404.00 in contract balances owing under the construction contract.

In the Oklahoma District Court, OCHA moved for default judgment against Globe on October 3, 1974, because Globe was not represented by counsel and on that day had no officer present in court.

On October 4, 1974, Globe's President announced in open court that Globe had filed a Chapter XI petition and suggested that the proceeding was stayed by Bankruptcy Rule 11-44a. The Oklahoma District Court, without regard to Bankruptcy Rule 11-44a, orally granted OCHA's Motion for Default Judgment. On October 7, 1974, default judgment against Globe was entered in the amount of \$427,504.00 (consisting of \$177,504.00 for liquidated damages and \$250,000.00 as punitive or exemplary damages), plus attorney fees, interest, and costs "to be fixed by the Court" over the objection of General (App. A-33).

On November 5, 1974, upon the application of Globe, the Bankruptcy Court enjoined OCHA from proceeding in the Oklahoma District Court against Globe or General for a period of ninety days (App. A-42). Since Globe indemnified General against General's potential liability to OCHA, the Bankruptcy Court found the Oklahoma proceedings against General would adversely interfere with the administration of the bankruptcy estate. On November 22, 1974, after the Colorado District Court refused to enjoin the Oklahoma District Court from continuing the proceedings involving Globe and General, Globe filed a petition with the Tenth Circuit to stay the Oklahoma District Court proceedings. The Tenth Circuit ordered a stay pursuant to Bankruptcy Rule 11-44a of the entire proceedings on November 25, 1974. The stay was modified on December 4,

1974 to permit the action to proceed against General. On January 31, 1975, the Tenth Circuit vacated the stay entirely and directed the parties to pursue their remedies by appeal (App. A-44).

On February 21, 1975, OCHA filed a proof of claim in the Colorado Bankruptcy Court based upon the Globe default judgment of \$427,504.00 (App. A-40). Globe objected to the allowance of OCHA's claim and sought to set off the contract balances owing by OCHA.

The Oklahoma District Court, having heard testimony in November, 1974 (before the Tenth Circuit stay) and February, 1975, rendered its judgment against General on April 30, 1975 by Memorandum Opinion (App. A-9). The Opinion denied all of Globe's claims asserted by General, purported to make findings of fraud by Globe, found material breaches of the contract by Globe and entered judgment against General on its performance bond for the full amount of OCHA's claims. The judgment included an award of attorney fees for the architects impleaded by OCHA. The judgment was silent with respect to the contract balances held by OCHA. General and Globe appealed the April 30, 1975 judgment of the Oklahoma District Court to the Tenth Circuit.

On May 30, 1975, after due notice to OCHA, the Bankruptcy Court conducted an evidentiary hearing upon OCHA's claim and Globe's objections and offsets. OCHA failed to appear, and the Bankruptcy Court received testimony from a vice-president of Globe. On August 11, 1975, the Bankruptcy Court issued its Memorandum Opinion disallowing the claim by OCHA in view of setoffs owing to

Globe. The Bankruptcy Court also found that the October 7, 1974 default judgment against Globe had been entered in violation of Bankruptcy Rule 11-44a and Section 311 of the Bankruptcy Act, 11 U.S.C.A. § 711 (1970), and declared the judgment null and void (App. A-35). *No appeal from the Bankruptcy Court judgment was taken by OCHA.* Subsequently, the Bankruptcy Court affirmed the plan of Globe on August 26, 1975, and all unsecured debts were discharged.

On November 30, 1975, before briefs were to be filed in Globe's appeal from the Oklahoma District Court, OCHA entered into a Stipulation and Release of Judgment with Globe in which OCHA stipulated that the default judgment entered against Globe on October 7, 1974 was null and void. OCHA released the default judgment, expressly reserving its rights and interests in the April 30, 1975 judgment against General. The Stipulation and Release of Judgment were filed in the Oklahoma District Court on December 1, 1975. On December 5, 1975, the Tenth Circuit dismissed the appeal taken by Globe from that judgment.

On January 13, 1978, the Tenth Circuit issued its opinion to which a Writ of Certiorari is sought by General. The Tenth Circuit expressly found:

"The liability of General, as surety, is joint and several to the liability of the principal, Globe. The power of a bankruptcy court to enjoin *in personam* suits is confined to suits against the debtor, and there is no jurisdiction to enjoin a suit brought to enforce the personal liability of a guarantor of bonds secured by a mortgage upon property owned by the debtor." (App. A-6). (Citations omitted; Court's emphasis.)

The Tenth Circuit also found that the other issues as to which General seeks review were all "questions of fact" (App. A-5).

On January 26, 1978, General filed its Petition for Rehearing. After requesting briefing of the Petition by the parties, the Tenth Circuit denied the Petition for Rehearing on March 23, 1978.

On April 11, 1978, OCHA requested that the original action between Globe and OCHA be placed on the docket of the Oklahoma District Court for a pretrial conference. Globe objected to the conference on the basis, *inter alia*, that the Oklahoma District Court had no further jurisdiction over Globe in view of the disallowance of OCHA's claim and the discharge by the Bankruptcy Court and the statutory injunction set forth in 11 U.S.C.A. § 332(f)(1) (1970), as well as the Stipulation and Release of Judgment entered into by OCHA and Globe on November 30, 1975. After a full briefing of the issues, on June 6, 1978, the Oklahoma District Court rendered a new judgment against Globe for \$250,000.00 in punitive damages. The Oklahoma District Court declared that Globe was collaterally estopped from denying liability by the prior judgment against General (App. A-50).

On June 16, 1978, Globe filed its notice of appeal from the June 15, 1978 District Court judgment.

Upon the basis of the foregoing facts, General respectfully requests that the Supreme Court issue a Writ of Certiorari to the Tenth Circuit for the reasons given below.

REASONS FOR GRANTING THE WRIT

I.

THE SUPREME COURT MUST RESOLVE THE CONFLICTS AMONG THE COURTS OF APPEALS CONCERNING THE JURISDICTION OF FEDERAL BANKRUPTCY COURTS IN CHAPTER XI PROCEEDINGS.

The Supreme Court must grant General's petition for writ of certiorari in order to secure uniformity in the judgments of federal courts with respect to the national rights provided by Chapter XI of the Bankruptcy Act, 11 U.S.C.A. §§ 701-799 (1970). The instant petition demonstrates the extreme confusion that currently exists with respect to the relevant bankruptcy law. As indicated in the above Statement of the Case, four judgments have been rendered by two different district courts upon identical issues of law and fact. The Oklahoma District Court has rendered three different judgments¹ finding Globe liable to OCHA (App. A-33, A-9 and A-50). The Colorado Bankruptcy Court has rendered a judgment that Globe is not indebted to OCHA (App. A-35). The Bankruptcy Court disallowed OCHA's claims against Globe in the Chapter XI proceeding.

The liability of General, as surety to Globe, under the judgment of the Oklahoma District Court is dependent upon the proper resolution of a single question: Which of

¹ The judgments of the Oklahoma District Court include: (1) The default judgment against Globe on October 7, 1974; (2) the judgment against General on April 30, 1975; and (3) the judgment against Globe rendered on June 6, 1978.

the two district courts, Oklahoma or Colorado, had proper jurisdiction to determine the liability of Globe to OCHA? As indicated below, the Courts of Appeals are in conflict concerning the extent of the jurisdiction granted the federal bankruptcy courts.

A. The Extent of the Jurisdiction of a Federal Bankruptcy Court in a Chapter XI Proceeding Is of National Importance.

Chapter XI of the Bankruptcy Act is currently the most commonly used chapter of the Bankruptcy Act to rehabilitate debtors. Chapter XI originally was designed to provide a simple procedure for a composition of unsecured creditors. See *SEC v. American Trailer Rentals Co.*, 379 U.S. 594 (1965). However, the Chapter XI procedure has become the dominant reorganization vehicle currently used by debtors.

The Honorable Saul Seidman, Bankruptcy Judge for the District of Connecticut and former President of the National Conference of Bankruptcy Judges, has described the growth in the use of the Chapter XI reorganization in the following manner:

"In practice, Chapter XI has grown far beyond the original concept of a simple composition with unsecured creditors for a mom-and-pop operation. Many Chapter XI cases involve large publically-owned corporations . . ." S. Seidman, *The Plight of the Secured Creditors in Chapter XI*, 80 COMM. L.J. 343, 345 (1975).

Judge Seidman further observed that the current uncertainty in the Bankruptcy Act and the new Bankruptcy Rules with respect to Chapter XI proceedings "... has led to confusion in the variety of decisions which the bankruptcy judges are handing down." *Id.* The reasons for the confusion are described below.

B. The Courts of Appeals Are in Conflict With Respect to the Extent of the Exclusive Jurisdiction Granted a Bankruptcy Court in a Chapter XI Proceeding.

The validity of the Oklahoma District Court judgment denying General, as indemnified surety and assignee of Globe, the benefit of the contract balances held by OCHA depends upon the ability of the Oklahoma District Court to exercise jurisdiction over the contract balances after Globe filed its Chapter XI petition. Although the Tenth Circuit affirmed the Oklahoma District Court's jurisdiction, the Courts of Appeals are in conflict over the extent of the exclusive jurisdiction granted bankruptcy courts by § 311 of the Bankruptcy Act, 11 U.S.C.A. § 711 (1970). Section 311 states:

"Where not inconsistent with the provisions of this chapter, the court in which the petition is filed shall, for the purpose of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located." Bankruptcy Act of 1898, Section 311, 11 U.S.C.A. § 711 (1970) (Emphasis added).

One leading treatise, *COLLIER ON BANKRUPTCY* (14th Ed. 1976) (hereinafter cited as "COLLIER"), has interpreted Section 311 to expand the jurisdiction of the bankruptcy

courts beyond that granted under Chapters I-VII (providing for ordinary bankruptcy liquidation). Noting that there is no provision comparable to Section 311 within Chapters I-VII, *COLLIER* concludes that the bankruptcy court has summary jurisdiction over property in the possession of third parties in which the bankrupt claims ownership. The summary jurisdiction of the bankruptcy court is limited to a determination of the existence of substantial adverse claims in the property by the third party. 8 *COLLIER*, at para. 3.03, at 162-63.

Another treatise, *REMINGTON ON BANKRUPTCY* (6th Ed. 1955) (hereinafter cited as "REMINGTON"), maintains a different position from *COLLIER*. *REMINGTON* concludes that Section 311 grants no greater jurisdiction in Chapter XI than in Chapters I-VII. *REMINGTON* finds the jurisdiction of the bankruptcy court to be limited to property in the actual or constructive possession of the bankrupt. *REMINGTON* further concludes that the bankruptcy court may not exercise summary jurisdiction over adverse claims to property held by third parties. 9 *REMINGTON*, at § 3574.

The Courts of Appeals are divided between the *COLLIER* (ownership) position and the *REMINGTON* (possession) position. A summary of the division among the Courts of Appeals is set forth below:

**Courts of Appeals Adopting the
REMINGTON (possession) position:**

Slenderella Systems of Berkeley, Inc. v. Pacific T. & T. Co., 286 F.2d 488 (2d Cir. 1961) (denying bankruptcy court summary jurisdiction over debtor's telephone number).

Lockhart v. Garden City Bank & Trust Co., 116 F.2d 658 (2d Cir. 1940) (chattel mortgagee entitled to repossess chattels during Chapter XI).

Sada Yoshinuma v. Oberdorfer Ins. Agency, 136 F.2d 460 (5th Cir. 1943) (state appointed receiver has superior claim to assets than Chapter XI estate).

In re Barasch, 439 F.2d 1393 (9th Cir. 1971) (denying bankruptcy court summary jurisdiction over disputed claims to community property in California).

Loyd v. Stewart & Nuss, Inc., 327 F.2d 642 (9th Cir. 1964) (denying summary jurisdiction of bankruptcy court to award debtor retained contract funds held by property owner).

Globe Const. Co. v. Oklahoma City Housing Authority, 571 F.2d 1140 (10th Cir. 1978) (pending determination on General's Petition for Writ of Certiorari herein).

See also *NYTCO Services, Inc. v. Hurley's Grain Elevator Co.*, 422 F.Supp. 114 (W.D. Tenn. 1976) (recognizing division among circuits and denying summary jurisdiction of bankruptcy court to proceed with sale of goods in the possession of field warehousing company).

**Courts of Appeals Adopting the
COLLIER (ownership) Position:**

In re Rubin, 378 F.2d 104 (3d Cir. 1967) (affirming bankruptcy court's summary jurisdiction over sales routes of debtor).

In re Copeland, 391 F.Supp. 134 (D.Del. 1975), aff'd in part and vacated in part, 531 F.2d 1195 (3d Cir. 1976) (affirming bankruptcy court order to turn over stock certificates pledged to creditor).

In re Stockman Development Company, 447 F.2d 387 (9th Cir. 1971) (affirming summary jurisdiction of bankruptcy court to order reclamation of personal property seized by county sheriff).

In *In re Stockman Development Company*, *supra*, the Ninth Circuit expressly indicated that its decision would conflict with that Circuit's own opinions in *In re Barasch*, *supra*, and *Loyd v. Stewart & Nuss, Inc.*, *supra*. The Ninth Circuit defended its adoption of the COLLIER position by referring to the authority granted a bankruptcy court under Section 314 of the Bankruptcy Act, 11 U.S.C.A. § 714 (1970):

"As additional evidence that the Chapter XI jurisdiction was not intended to be restricted to a theory of possession, Section 314, 11 U.S.C.A. Sec. 714 expressly gives the Bankruptcy Court authority to protect assets by injunction and to stay foreclosure proceedings—not just assets in the possession of the bankrupt."

"The cases in this circuit on the point appear to be in some disarray." *In re Stockman Development Company*, 447 F.2d 387, 390 (9th Cir. 1971).

General respectfully submits that the **COLLIER** position is the better reasoned. One of the purposes of the Bankruptcy Act is to place the property of the debtor under the exclusive control of one court for proper distribution. Congress has recently amended the Bankruptcy Act to expand the exclusive jurisdiction of the bankruptcy courts. *See Bankruptcy Act, Section 17, 11 U.S.C.A. § 35 (1970)* (providing exclusive jurisdiction in bankruptcy courts to determine the nondischargeability of debts for fraud). Reducing the number of courts that are involved in proceedings collateral to the bankruptcy proceeding will reduce the opportunity for conflict and inconsistent findings among different courts as have arisen in the instant case. Centralizing the authority to resolve claims against the debtor would be more efficient. Finally, the centralization of authority in bankruptcy courts will reduce the chances for injustice.

In the instant case, the Tenth Circuit failed to uphold the jurisdiction of the bankruptcy court over the contract balances held by OCHA. Consequently, the courts in two different districts awarded the contract balances to different parties. The **COLLIER** interpretation of Section 311 of the Bankruptcy Act would have avoided this anomalous result.

The Supreme Court has never interpreted Section 311 of the Bankruptcy Act, 11 U.S.C.A. § 711 (1970).

The Supreme Court must issue a writ of certiorari in this cause and resolve the conflict among the Courts of Appeals upon the extent of the exclusive jurisdiction granted the bankruptcy courts under Section 311 of the Bankruptcy Act.

C. The Supreme Court Must Limit the Jurisdiction of Courts Over Actions Collateral to a Chapter XI Bankruptcy Proceeding.

- 1. The bankruptcy court must be held to possess exclusive jurisdiction to determine the liability of a debtor upon an unliquidated claim.**

The Supreme Court must grant certiorari to secure uniformity in the jurisdiction and judgments of federal courts. The Tenth Circuit erroneously found the Oklahoma District Court, rather than the Colorado Bankruptcy Court, to have jurisdiction to determine the liability of *Globe* (bankrupt) on the unliquidated claims of OCHA during the pendency of the bankruptcy proceedings. The claims of OCHA against *Globe* and General were unliquidated at the time that *Globe* filed its Chapter XI petition. The claims of OCHA had not been reduced to a sum certain by agreement of the parties or judgment of a court.

The Supreme Court must find that the Colorado Bankruptcy Court had exclusive jurisdiction to determine the liability of *Globe* upon all claims unliquidated at the time of the filing of the Chapter XI petition. The intent of Congress to grant the bankruptcy court exclusive jurisdiction over the debtor is plainly stated in Section 311 of the Bankruptcy Act, 11 U.S.C.A. § 711 (1970) (discussed in part I.B. *supra*). Section 311 provides the bankruptcy court with "... exclusive jurisdiction of the debtor and his property, wherever located." *Id.* The jurisdiction granted by this section must extend to the determination of all unliquidated claims against the debtor. *See Texaco, Inc. v. Lib-*

erty National Bank & Trust Company of Oklahoma City, 464 F.2d 389 (10th Cir. 1972) (reversing judgment against debtor entered in proceeding collateral to bankruptcy); 8 COLLIER, at para. 3.20.

The exclusive jurisdiction of the Colorado Bankruptcy Court over OCHA's claims against Globe is also demonstrated by new Bankruptcy Rule 11-44(a). This rule enjoins "the continuation of any court . . . proceeding against the debtor . . ." Bankruptcy Rule 11-44(a). The stay provided by the rule becomes effective automatically upon the filing of a petition for relief under Chapter XI and the giving of notice of the filing. 14 COLLIER, at para. 11-44.02. Section 311 and Bankruptcy Rule 11-44(a) have been construed to preclude creditors from pursuing their claims against the bankrupt-debtor in any forum apart from the bankruptcy court without first seeking relief from the automatic stay before the bankruptcy court. 8 COLLIER, at para. 3.20; 14 COLLIER, at para. 11-44.02.

In the instant case, the Oklahoma District Court failed to respect the exclusive jurisdiction of the bankruptcy court. The Oklahoma District Court first entered a default judgment against Globe itself, which was void beyond question and subsequently released by OCHA. Thereafter, the Oklahoma District Court made an independent determination of the liability of Globe in order to determine the vicarious liability of General to OCHA. The result has been the entry of conflicting judgments.

The Supreme Court must grant certiorari in order to resolve the conflicting judgments between the Colorado Bankruptcy Court and the Oklahoma District Court.

2. The filing of a proof of claim in a bankruptcy proceeding by a creditor submits the creditor to the jurisdiction of the bankruptcy court on all matters arising from the claim.

OCHA consented to the jurisdiction of the Colorado Bankruptcy Court when it filed its proof of claim in the bankruptcy proceeding. The consent to the jurisdiction of the bankruptcy court extends to the determination of all objections and counterclaims arising from the filed claim. 2 COLLIER, at para. 23.08[5].

This Court has expressly held that a creditor is subject to the jurisdiction of the bankruptcy court upon all counterclaims arising from the claim filed by the creditor in the bankruptcy proceedings. *Katchen v. Landy*, 382 U.S. 323 (1966) (creditor bound by bankruptcy court determination that he had received a voidable preference). In *Katchen* this Court held:

"More specifically, a creditor who offers a proof of claim and demands its allowance is bound by what is judicially determined, and if his claim is rejected, its validity may not be relitigated in another proceeding on the claim." *Id.*, at 334 (Citations omitted). Accord, *Century Geophysical Corp. v. Cal. Bd. of Equalization*, 564 F.2d 342 (9th Cir. 1977) (action by creditor on claim disallowed by bankruptcy court barred by res judicata); 1B J. MOORE, *FEDERAL PRACTICE*, para. 0.419 [3-1] (1978).

OCHA submitted to a determination by the Colorado Bankruptcy Court of its claims against Globe. OCHA must not be permitted to litigate that liability in another proceeding, collateral to the bankruptcy court, against General.

3. The liability of a debtor upon an unliquidated claim must not be determined in an action against the debtor's surety that is collateral to the bankruptcy proceedings.

The Oklahoma District Court must be precluded from determining the liability of Globe upon OCHA's *unliquidated* claim in an action against General. The liability of General, as surety to Globe, arises from the alleged non-performance by Globe, its principal, of the construction contract. A. STEARNS, *THE LAW OF SURETYSHP*, § 1.1 (5th Ed. 1951). The performance of Globe should be determined by the court having proper jurisdiction over Globe before the liability of General is determined in a collateral proceeding.

In contrast, a creditor may be permitted to proceed against the debtor's surety in a collateral proceeding upon *liquidated* claims. Section 16 of the Bankruptcy Act, 11 U.S.C.A. § 34 (1970), provides that the discharge of a bankrupt does not affect the liability of the bankrupt's surety. A *discharge* in bankruptcy does not exonerate the bankrupt from a *liquidated* debt, but only provides him with a personal defense against the creditor. Section 16 limits this personal defense for the sole benefit of the bankrupt. The surety remains liable upon a *liquidated* debt because the underlying debt is undisturbed. 1A COLLIER, at para. 16.02. For this reason, creditors may proceed against the debtor's surety on a *liquidated* debt during the pendency of the bankruptcy, *e.g.*, *In re Stanndco Developers, Inc.*, 534 F.2d 1050 (2d Cir. 1976) (state court proceeding allowed against surety's bond), or after the discharge of the

bankrupt. *E.g.*, *In re General Steel Tank Company, Inc.*, 478 F.2d 294 (4th Cir. 1973) (discharge does not affect liability of surety on bond).

The Supreme Court must hold, however, that a creditor may not proceed against a debtor's surety in an action collateral to the bankruptcy upon an *unliquidated* claim. The bankruptcy court has exclusive jurisdiction to determine the liability of the debtor on *unliquidated* claims. The liability is determined by the bankruptcy court in its consideration of allowing or disallowing the claim. If the claim is allowed, the amount of the claim is determined and becomes *liquidated*. After, but only after a creditor's claim is allowed (*i.e.*, is *liquidated*) can he proceed against the surety.

If the claim is disallowed by the bankruptcy court upon its merits, as it was here, the underlying debt of the bankrupt is exonerated. The exoneration of the bankrupt arises from the judicial determination by the bankruptcy court that no debt exists between the bankrupt and creditor. Therefore, the disallowance is an adjudication upon the merits of the debt underlying the claim. *Katchen v. Landy*, 382 U.S. 323 (1966). The disallowance of the claim by the bankruptcy court is also *res judicata* between the parties. Therefore, the creditor is collaterally estopped from pursuing a disallowed claim against the surety of the bankrupt in a subsequent action. 1B J. MOORE, *FEDERAL PRACTICE*, para. 0.419[3-5] (1978); A. STEARNS, *THE LAW OF SURETYSHP* § 6.43 (5th ed. 1951); J. MACLACHLAN, *HANDBOOK OF THE LAW OF BANKRUPTCY* 139 (1956). OCHA's claim against Globe was disallowed upon its merits by the

Colorado Bankruptcy Court, and OCHA did not appeal. OCHA is collaterally estopped to pursue remedies against Globe's surety. General is entitled to be exonerated from all liability to OCHA because General's principal has been exonerated. The judgment of OCHA against General must be set aside.

The Supreme Court must grant certiorari to prevent future conflicts between district courts that attempt to determine the liability of a surety upon unliquidated claims against a bankrupt-principal during the pendency of the bankruptcy proceedings.

II.

THE DECISION OF THE TENTH CIRCUIT DENYING THE RIGHTS OF THE SURETY TO CONTRACT BALANCES BECAUSE OF THE PURPORTED FRAUD OF ITS PRINCIPAL IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THE OKLAHOMA SUPREME COURT.

Even if this Court should determine that the Oklahoma District Court, and not the Colorado Bankruptcy Court, had jurisdiction, certiorari must nevertheless be granted to correct an error made with respect to an important issue of state law. The action was brought in federal court based upon the diversity of citizenship of the parties and the amount in controversy. 28 U.S.C. § 1331 (1970). In a diversity action, state law must be applied to the substantive issues of law. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Therefore, the law of Oklahoma must be applied to determine the rights of General to the contract balances held by OCHA.

The Tenth Circuit affirmed the decision of the Oklahoma District Court that denied General the benefit of the contract balances because of the purported fraud of Globe. The effect of the Tenth Circuit's opinion is to make General an indemnitor of Globe's fraud, even though General's performance bond did not indemnify against fraud (App. A-46). General indemnified OCHA against the uncompleted work of Globe and was entitled to full credit for all completed work. The Oklahoma District Court granted OCHA a windfall at the expense of General. The Tenth Circuit affirmed this unjust enrichment of OCHA. The decision of the Tenth Circuit is in conflict with the applicable decisions of the Supreme Court of Oklahoma.

A. The Rights of a Surety to Contract Balances Is a Matter of National Importance.

The Tenth Circuit's denial of a surety's right to contract balances will have a substantial adverse impact upon the national construction industry. Sureties necessarily and justifiably rely upon their rights to retainages, progress payments, and other contract balances in assessing the risks that they are undertaking through their performance and payment bonds. The assessment of these risks affect their determination to issue indemnifying bonds and the amount of premiums charged for the bonds.

If sureties are denied their historically protected rights, the risks imposed upon the sureties would be greatly increased. As a result, the number of bonds that are issued would probably be reduced, and premium costs would most certainly be substantially increased, with an immediate and

adverse impact on the ability of public entities to construct buildings for the public good. All major public construction contracts require performance and payment bonds. *E.g.*, Miller Act, §§ 1 and 2(b), 40 U.S.C.A. §§ 270a and b (1970); 61 Okla. Stat. § 113 (1978 Supp.). Either a significant reduction in the amount of construction, or a further increase in today's spiraling construction costs, would seriously aggravate an already troubled national economy.

The importance of the present issue is further indicated by the fact that the performance bond in the instant case is in the standard form currently used by the United States Department of Housing and Urban Development ("HUD"). The HUD forms were used because federal financing was provided to the project. Therefore, the performance bond erroneously construed by the Tenth Circuit is currently in use throughout the United States.

B. The Oklahoma Supreme Court Limits the Liability of a Surety to the Strict Terms of His Indemnity Contract.

General may not be denied its rights to the contract balances held by OCHA because of the purported fraud by Globe. The judgment of the Oklahoma District Court does not specify the basis upon which General was denied credit for the contract balances held by OCHA. In the judgment against General, the Oklahoma District Court entered findings of fraud against Globe. In a single conclusory sentence, the District Court found that General "... should have and recover nothing as against the defendant [OCHA]." (App. A-25). OCHA made extensive claims during trial that

the contract balances were forfeited by reason of Globe's purported fraud. General may only assume that the Oklahoma District Court held that the purported fraud of the principal caused the forfeiture of the rights of the surety to the contract balances. The Tenth Circuit affirmed the judgment of the Oklahoma District Court without expressly considering this issue.

The following discussion is submitted upon the assumption, *in arguendo*, that the purported fraud of Globe was properly found.²

The Oklahoma Supreme Court has consistently held that a bond is not to be construed to extend the liability of the surety beyond the terms of the contract. *E.g.*, *United States Fidelity & Guaranty Co. v. Gray*, 106 Okla. 222, 233 Pac. 731 (1925) (obligations of surety discharged because of the failure to give notice of principal's default as required by the bond).

In an action analogous to the instant case, the Supreme Court of Oklahoma denied the attempt to extend the liability of the surety beyond that set forth in the contract. In *Employers' Liability Assurance Corporation Ltd. v. Cannon*, 173 Okla. 493, 49 P.2d 107 (1935), property owners sued a surety to collect unpaid workmen's com-

² General must emphasize its disagreement with the trial court's findings of fraud against Globe. In the discussion of subsequent issues, General demonstrates that the determination of fraud was based upon surprise allegations made for the first time during the trial. The trial court denied Globe and General any opportunity to effectively meet these allegations. Furthermore, the finding of fraud was erroneous on the merits because of the total failure of proof of at least two essential elements of that cause of action.

pensation insurance premiums. The judgment against the surety was reversed by the Oklahoma Supreme Court because the bond indemnified only ". . . indebtedness for labor and material furnished." The surety was held to have no liability beyond the strict terms of the contract. The Oklahoma Supreme Court stated:

"The liability of the surety in this case arises from the terms of the bonds and statute requiring the same. It cannot be extended beyond the limits of a fair and liberal interpretation thereof." *Id.*, 49 P.2d at 105.

The decision of the Tenth Circuit that affirmed the denial to General of the contract balances effectively extended the liability of General to indemnify against the fraud of the contractor. The performance bond issued by General to OCHA did not indemnify against fraud. Under Oklahoma law, liability of a surety may not be extended by construction or implication beyond the terms of the indemnity agreement.

This Court must issue a writ of certiorari to correct the serious error of state law that has been made by the Tenth Circuit.

III.

THE SUPREME COURT MUST GRANT CERTIORARI TO REQUIRE DISTRICT COURTS TO APPLY FED. R. CIV P. 15(b) IN A MANNER CONSISTENT WITH DUE PROCESS OF LAW.

A. The Supreme Court Must Exercise Its Supervisory Powers to Insure All Parties Receive Due Process of Law.

The decision by the Oklahoma District Court permitting OCHA to amend its causes of action to include fraud, affirmed by the Tenth Circuit, denied General due process of law. The proceedings departed from the two fundamental precepts of due process: (1) Prior notice of all claims, and (2) an opportunity to present a defense. Both of these prerequisites to justice were denied General.

At the time of trial, General had no prior notice of the claims of fraud by OCHA. No allegation of fraud was contained in any pleadings or pretrial statement. The first notice of the fraud allegations was given in the opening statement of OCHA's counsel at trial. The Oklahoma District Court permitted OCHA to cross-examine witnesses and introduce other evidence of fraud during the initial days of trial. General, having no prior notice of the fraud claims, had no opportunity to prepare a defense against the claims. After the first three days of trial, the Oklahoma District Court made "preliminary" findings of fraud. The Oklahoma District Court precluded all opportunity by General to present a defense to the fraud claims of OCHA by subsequently entering on October 7, 1974, a default judgment for fraud against Globe. The earlier findings of fraud

against Globe were incorporated into the judgment against General.

The Supreme Court has expressly recognized that the opportunity to present a defense is guaranteed by the due process clause of the 14th Amendment to the United States Constitution. In *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930), this Court considered the due process clause in an action concerning local property tax assessment. The plaintiff had brought suit to enjoin the assessment of a property tax relying upon a decision of the Missouri Supreme Court that the State Tax Commission was without authority to grant the relief that the taxpayer requested. The Missouri Supreme Court reversed its prior decision and confined the plaintiff to the sole remedy of appealing to the State Tax Commission. By the time the Missouri Supreme Court rendered its decision, plaintiff's time for appeal to the Commission had elapsed. Plaintiff's request for review by this Court was granted since the plaintiff was precluded from all remedies without ever having the opportunity to present a defense. This Court reversed the Missouri Supreme Court and declared the plaintiff was guaranteed the right to present a defense by the due process clause of the 14th Amendment. This Court stated:

"It is plain that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense." *Id.*, at 678 (Emphasis added). Cf. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (Wisconsin statute permitting prejudgment garnishment of wages without prior notice or hear-

ing denies due process of law); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (Florida prejudgment replevin statute permitting repossession of chattels without prior notice or hearing denies due process of law).

The practical effect of the decisions of the Oklahoma District Court was to deny General any opportunity to present a defense to the claims of fraud against its principal, Globe.³ This Court must grant certiorari to provide General with due process of law as guaranteed by the 14th Amendment to the federal Constitution.

B. The Supreme Court Must Exercise Its Supervisory Powers to Insure Adherence to the Federal Rules of Civil Procedure by the Federal District Courts.

The Oklahoma District Court allowed OCHA to amend its pleadings and present evidence in violation of Fed. R. Civ. P. 15(b). The Oklahoma District Court permitted OCHA to amend its pleadings to state a cause of action for fraud during the conduct of the trial. The decision of the Oklahoma District Court was made without reference to Rule 15(b), Fed. R. Civ. P.

The Supreme Court has never interpreted Rule 15(b), Fed. R. Civ. P. One leading authority on the Federal Rules

³ The default judgment against Globe for fraud was declared null and void by the Bankruptcy Court and released by the parties. On June 6, 1978, the Oklahoma District Court rendered a final judgment of fraud against Globe on the basis that Globe was collaterally estopped by the finding of fraud made in the judgment against General. However, the judgment against General was based upon the first (void) default judgment against Globe. The circular reasoning of the Oklahoma District Court has denied General and Globe any ability to defend against the fraud charges.

of Civil Procedure has described the purpose of the rule to permit amendments to pleadings during trial when objections are made to evidence. Although amendments are to be freely allowed under the Rule, the authors conclude that the court must *not* allow the amendment if the opposing party will be prejudiced in his defense of the action. **6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1491, at 453 (1971).** The authors specifically admonish:

"Of course, if a court acts arbitrarily and capriciously in granting leave to amend under Rule 15(b), it may constitute a violation of due process." *Id.*, at 455.

The allowance of the amendments by OCHA claiming fraud substantially prejudiced the rights of General. Having no opportunity to prepare or present a defense, judgments were entered against General. Execution upon these judgments will deprive General of substantial property without due process of law.

The Supreme Court must grant certiorari to supervise the conduct of federal district courts. The Supreme Court must require district courts to apply Rule 15(b), Fed. R. Civ. P., in a manner consistent with the due process clause of the 14th Amendment to the federal Constitution.

IV.

THE DECISION OF THE TENTH CIRCUIT IS IN CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT OF OKLAHOMA REGARDING THE SUBSTANTIVE RULES OF LAW APPLIED TO THIS ACTION.

The judgment rendered by the Oklahoma District Court conflicts with applicable decisions of the Supreme Court of Oklahoma. The law of Oklahoma is controlling since the action is based upon diversity of citizenship.

The Tenth Circuit refused to review several substantive errors of law made by the Oklahoma District Court. The Tenth Circuit stated:

"Many of the matters raised by General Insurance on appeal concern what we deem to be questions of fact which were resolved by the trial judge on the basis of conflicting evidence." (App. A-5).

General respectfully submits that the following issues are questions of law. The decision of the Tenth Circuit was error.

A. The Oklahoma District Court Applied the Wrong Measure of Damages Against General.

Even if the judgment against General was otherwise proper, the trial judge applied the wrong measure of damages against General. The Supreme Court of Oklahoma has declared, as a matter of law, that an owner may only recover his costs of completing construction when he assumes control of the construction. *Mason v. Continental Supply Company*, 99 Okla. 32, 225 Pac. 381 (1924) (contractor

abandons project); *Accord, New Haven v. National Steam Economizer Co.*, 79 Conn. 482, 65 Atl. 959 (1907) (owner terminates contract and completes construction); *Village of Canton v. Globe Indemnity Company*, 201 App. Div. 820, 195 N.Y.S. 445 (1922) (contractor abandons project). In *Mason v. Continental Supply Company*, *supra*, the Supreme Court of Oklahoma reversed an award of liquidated damages granted to a completing owner. See also, *United States v. American Surety Company*, 322 U.S. 96 (1944) (government-owner terminating contract and completing construction may recover only cost of completion).

The Oklahoma District Court awarded OCHA judgment for the liquidated damages provided by the contract from the contract completion date to the date of Globe's termination by OCHA and thereafter to the date OCHA completed construction. OCHA was limited by Oklahoma law to recovering liquidated damages only to the date of termination, together with its costs of completion, a much smaller amount. The decision of the Oklahoma District Court was error as a matter of law.

B. The Oklahoma District Court Failed to Require the Proof of All Essential Elements of Fraud as Required by Oklahoma Law.

OCHA did not prove all of the essential elements of fraud as required by Oklahoma law. The Supreme Court of Oklahoma has expressly required clear and convincing proof of: (1) reliance upon an intentional misrepresentation and (2) injury resulting from that reliance. Both reliance and injury, along with other elements, must be proven

to establish fraud. The absence of a single element essential for fraud is fatal to the cause of action. *Steiger v. Commerce Acceptance of Oklahoma City, Inc.*, 455 P.2d 81 (Okla. 1969) (fraud in the inducement of contract not proven); *Brotherhood of Railroad Trainmen v. Brown*, 180 Okla. 487, 71 P.2d 742 (1937) (fraud in obtaining a contract not proven).

OCHA did not offer one iota of evidence that it had relied upon any misrepresentations of Globe or that any purported fraud by Globe had resulted in injury. The judgments of the Oklahoma District Court finding fraud by Globe were erroneous as a matter of law.

C. The Oklahoma District Court Erroneously Permitted OCHA to Recover From General the Attorney Fees of a Third Party Defendant Impleaded by OCHA.

The Oklahoma District Court wrongfully permitted OCHA to recover from General the attorney fees incurred by an architectural firm joined as a third party defendant by OCHA. Globe had made no claim against the architects. OCHA joined them to seek indemnity from Globe's claims against OCHA. The architects prevailed in their defense to the third-party complaint. Purportedly acting pursuant to an Oklahoma statute, 12 Okla. Stat. § 936 (1971), the Oklahoma District Court assessed the attorney fees of the architects against General, as Globe's surety.

OCHA was not entitled to recover the attorney fees of the third-party defendants against General. The Supreme Court of Oklahoma has declared that the Oklahoma

statute relied upon by OCHA does not apply to contracts for labor and materials, which was the basis of Globe's claims. *Russell v. Flanagan*, 544 P.2d 510 (Okla. 1975) (contract for servicing sewer line); *Hamilton v. Telex Corp.*, 576 P.2d 769 (Okla. 1978) (contract for services). Furthermore, the Supreme Court of Oklahoma has held that the Oklahoma statute permits only the awarding of attorney fees against parties who were in direct opposition to the prevailing party. *Hardesty v. Andro Corp.—Webster Division*, 555 P.2d 1030 (Okla. 1976) (suit involving owner-contractor, subcontractor, and manufacturer). Therefore, the Oklahoma District Court erroneously permitted OCHA to recover against General the attorney fees awarded to the architects. The error of the Oklahoma District Court was an error of law.

For the reasons given above, the Supreme Court should grant certiorari and reverse or summarily vacate the decision of the Tenth Circuit that is in conflict with applicable decisions of the Supreme Court of Oklahoma.

CONCLUSION

For the reasons given above, General respectfully prays that the Supreme Court issue a writ of certiorari for the United States Court of Appeals for the Tenth Circuit to review and consider the merits of petitioner's claims, or to vacate summarily the decision of the Tenth Circuit and remand for further consideration in view of the decision of the Colorado Bankruptcy Court entered subsequent to the perfecting of the appeal before the Tenth Circuit.

Respectfully submitted,

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June, 1978

APPENDIX

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FILED
United States Court of Appeals
Tenth Circuit
JAN 13 1978
HOWARD K. PHILLIPS
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 75-1464, 75-1465, 75-1466, 75-1467, 75-1469, 75-1470,
75-1471, 75-1472, 75-1475, 75-1479 and 75-1480

GLOBE CONSTRUCTION Co., a corporation,)
Plaintiff-Appellant in 75-1479 and 75-1480,)
v.)
OKLAHOMA CITY HOUSING AUTHORITY,)
Third Party Plaintiff-Appellee in 75-1465,)
JACK MATHERLY, dba JACK MATHERLY MECHANICAL CONTRACTOR (Appellee in 75-1470); O. C. MADDOX, dba MADDOX PAINT CONTRACTING COMPANY;)
MCS SERVICES, INC., a corporation (Appellee in 75-1471); ROCK CREEK HOME CENTER, INC., a corporation (Appellee in 75-1469); KATIE ANDER STATSER, as Administratrix of the Estate of A. F. Statser, deceased (Appellee in 75-1466);)
BUILDERS SPECIALTY, INC. (Appellee in 75-1475); OKLAHOMA TILE COMPANY, INC.; THE CECO CORP.; JERRY W. TAYLOR, dba CONCRETE CONSTRUCTION COMPANY (Appellee in 75-1467);)
Appeal from the United States District Court for the Western District of Oklahoma)
(D.C. No. C-73-641))

[APPENDIX]

GREEN OLMAN; RAY DAVIS, dba PIONEER FLOOR COMPANY (Appellee in 75-1464, 75-1479 and 75-1480); BILL COX, dba HOML IMPROVEMENT COMPANY (Appellee in 75-1472), Defendants,)
 GENERAL INSURANCE COMPANY OF AMERICA,)
 Defendant-Appellant in 75-1464, 75-1465, 75-1466, 75-1467, 75-1469, 75-1470, 75-1471, 75-1472 and 75-1475,)
 GEORGE SEMINOFF, WAYNE W. BOWMAN and ALBERT W. BODE, partners doing business as SEMINOFF-BOWMAN-BODE,)
 Third-Party Defendants,)
 SOUTHWEST ELECTRIC CO., INC.,)
 Intervenor-Defendant.)

Submitted on July 18, 1977

Judson S. Woodruff, Oklahoma City, Oklahoma (McAfee, Taft, Mark, Bond, Rucks & Woodruff, Oklahoma City, Oklahoma with him on the briefs) for Globe Construction Co. William B. Rogers, Oklahoma City, Oklahoma for Oklahoma City Housing Authority.

Carl E. Moslander, Oklahoma City, Oklahoma for Jack Matherly, dba Jack Matherly Mechanical Contractor.

John B. Hayes, Oklahoma City, Oklahoma (Looney, Nichols, Johnson & Hayes, Oklahoma City, Oklahoma with him on the briefs) for MCS Services, Inc.; Katie Alexander Statser, as Administratrix of the Estate of A. F. Statser, deceased; Jerry W. Taylor dba Concrete Construction Company; and Bill Cox dba Home Improvement Company.

[APPENDIX]

Kenneth Dewbre, Oklahoma City, Oklahoma for Rock Creek Home Center, Inc.
 Robert K. Roach, Wichita Falls, Texas (Gibson, Darden and Hotchkiss, Wichita Falls, Texas with him on the brief) for Builders Specialty Inc.
 John B. Estes, Oklahoma City, Oklahoma (Stipe, Gossett, Stipe & Harper, Oklahoma City, Oklahoma with him on the briefs) for Ray Davis dba Pioneer Floor Company.
 Byrne A. Bowman, Oklahoma City, Oklahoma (Felix, Bowman, McIntyre & McDivitt, Oklahoma City, Oklahoma with him on the briefs) for General Insurance Company of America.

Before McWILLIAMS and DOYLE, Circuit Judges, and MARKEY, Chief Judge.*

McWILLIAMS, Circuit Judge.

This controversy arises out of a construction contract that went awry. Globe Construction Company, a Colorado corporation, entered into a contract with the Oklahoma City Housing Authority, a public corporate body organized under the laws of Oklahoma, to perform certain rehabilitation work on the Will Rogers Low Rental Housing Project in Oklahoma City, Oklahoma. General Insurance Company, as surety, executed a performance bond on behalf of Globe. Various subcontractors were employed by Globe.

The prime contract called for job completion within 180 days. The Authority determined to its satisfaction that there had been a failure by Globe to make timely perform-

*Of the United States Court of Customs and Patent Appeals, Washington, D. C., sitting by designation.

ance, and accordingly the Authority terminated its contract with Globe, and completed the work itself. Invoking diversity jurisdiction, Globe then brought suit in the United States District Court for the Western District of Oklahoma against the Authority based on what it alleged was a wrongful termination of the contract between the parties. Numerous subcontractors were also named by Globe as parties defendant, Globe alleging that these subcontractors had failed to perform. The Authority and the named subcontractors in turn asserted counterclaims against Globe.

During the course of the Oklahoma federal court proceedings, Globe filed for Chapter XI arrangement proceedings under the Bankruptcy Act in Colorado. Globe's surety on the performance bond, the General Insurance Company, was then joined as a party in the Oklahoma proceeding. Trial of this case was to the court, sitting without a jury, and culminated in a detailed, 17-page memorandum opinion. In general, the trial judge held adversely as to General Insurance on any claims asserted by it, on behalf of Globe, against the Authority or any of the named subcontractors. Concerning the defendants' counterclaims, the trial court held for the counterclaimants and against General Insurance. One defendant-counterclaimant, Ray Davis, doing business as Pioneer Floor Company, was also awarded judgment against Globe.

Eleven notices of appeal were filed, each seeking review of the judgment as entered by the trial court. Nine of the notices of appeal were filed by General Insurance and two by Globe. We shall first consider the nine appeals of General Insurance.

Nos. 75-1464, 75-1465, 75-1466, 75-1467, 75-1469, 75-1470, 75-1471, 75-1472, and 75-1475

The nine appeals discussed here concern General Insurance and its dispute with the Authority and some eight of the subcontractors. As indicated, the trial judge dismissed the claims asserted by General Insurance, on behalf of Globe, against the Authority and the subcontractors, and at the same time awarded the Authority and the subcontractors substantial damages, and attorney's fees, against General Insurance, based on the obligation which General Insurance assumed when, as surety, it issued Globe a performance bond. Many of the matters raised by General Insurance on appeal concern what we deem to be questions of fact which were resolved by the trial judge on the basis of conflicting evidence. For example, such matters as fraud in the inducement; waiver of such fraud; latent conditions, defective plans, timely performance; substantial performance; waiver of any right to terminate; reasonable attorney's fees are in reality factual issues, not legal issues. It is of course axiomatic that resolution by a trial judge of controverted issues of fact are not to be overturned by an appellate court unless they are clearly erroneous. In the instant case the trial judge's critical findings of fact are not, in our view, clearly erroneous. On the contrary, the court's findings are supported by the record and accordingly on appeal must be accepted.

Two matters urged by General Insurance merit brief comment. As mentioned above, after Globe instituted the present action against the Authority and the named subcontractors, Globe filed for Chapter XI arrangement proceedings under the Bankruptcy Act in Colorado. The bankruptcy referee thereafter entered an order staying all proceedings against Globe and its surety, General Insurance. The federal district court in Oklahoma ignored this stay order and, after hearing, entered judgment against

both Globe and General Insurance. Consideration of the judgments thus entered against Globe will be deferred for the moment. Speaking now only as to the judgments entered against General Insurance, the surety, General argues that because of the pending bankruptcy proceedings involving Globe in Colorado, the federal court in Oklahoma should not have continued to proceed as to the surety, General Insurance, nor should it have entered judgment against General based on the latter's performance bond. Under the circumstances, we do not agree.

A primary purpose of the Bankruptcy Act is to place the property of the debtor under the control of the bankruptcy court. To protect its jurisdiction the bankruptcy court may enjoin suits against the debtor or involving the debtor's property in another court. *Texaco, Inc. v. Liberty National Bank & Trust Company of Oklahoma City*, 464 F.2d 389 (10th Cir. 1972). However, the instant case, insofar as it relates to General Insurance, is not a proceeding against Globe nor does it concern any property belonging to Globe. The claim by the Authority and the various subcontractors against General Insurance was based on the obligation assumed by General Insurance under the terms and provisions of the performance bond. The liability of General, as surety, is joint and several to the liability of the principal, Globe. The power of a bankruptcy court to enjoin *in personam* suits is confined to suits against the debtor, and there is no jurisdiction to enjoin a suit brought to enforce the personal liability of a guarantor of bonds secured by a mortgage upon property owned by the debtor. *8 Collier on Bankruptcy* ¶ 3.22, at 250 (14th ed. 1976). See also, *Loyd v. Stewart & Nuss, Inc.*, 327 F.2d 642 (9th Cir. 1964). For cases holding that a court of bankruptcy is without jurisdiction to enjoin proceedings where creditors of the bankrupt institute proceedings against the surety of the bankrupt, see *Jaquith v. Rowley*, 188 U.S. 620 (1903).

and *Brown v. Four-in-One Coal Co.*, 286 F. 512 (6th Cir. 1923), *cert. denied*, 262 U.S. 749 (1923). See also *Metcalf v. Barker*, 187 U.S. 165 (1902) and *Linstroth Wagon Co. v. Ballew*, 149 F. 960 (1907).

As indicated, the trial judge permitted the Oklahoma proceedings to continue against both Globe and General after being advised of the institution of bankruptcy proceedings involving Globe in Colorado. Judgments were initially entered against both Globe and General. Subsequently, however, the Authority became convinced that its judgment against Globe was invalid, because such had been entered during the pendency of the bankruptcy proceedings. During the process of Globe's appeal, Globe and the Authority executed a release of the judgment. The release was carefully worded to the end that it released only the judgment obtained by the Authority against Globe, and specifically provided that it did not release the judgment obtained by the Authority against General Insurance. Notwithstanding, General Insurance now contends that the release of the judgment against Globe also released the judgment entered against General Insurance. We do not agree. The liability of General Insurance was both joint and several from the liability of Globe. The fact that the Authority released the judgment which it had obtained against Globe did not release the judgment against General Insurance. Under Oklahoma law the release of one joint obligor is not a release of any other obligor when the intent to reserve as to the latter is clearly expressed. *Barsh v. Mullins*, 338 P.2d 845 (Okla. 1959) and *All American Bus Lines v. Saxon*, 172 P.2d 424 (Okla. 1946). And the same rule has been applied to releases of judgment. *Hambright v. City of Cleveland*, 360 P.2d 493 (Okla. 1960).

The judgments in 75-1464, 75-1465, 75-1466, 75-1467, 75-1469, 75-1470, 75-1471, and 75-1472 and 75-1475 are severally affirmed.

Nos. 75-1479 and 75-1480

These two appeals were filed by Globe and concern judgments entered against it in favor of Ray Davis, doing business as Pioneer Floor Company, one of the subcontractors. The first of these two appeals, No. 75-1479, relates to a judgment entered in favor of Davis in the sum of \$6,011.93 on his counterclaim. The second appeal, No. 75-1480, pertains to a further judgment later entered in favor of Davis in the amount of \$1,000, this sum representing reasonable attorney's fees. Davis also enjoyed a similar judgment on its counterclaim against General Insurance, the latter appealing that judgment in No. 75-1464.

The judgment entered against Globe in No. 75-1480 for \$1,000 as attorney's fees was entered after the institution of bankruptcy proceedings by Globe in Colorado. Davis in this Court makes no effort to defend that particular judgment. Accordingly, the judgment in No. 75-1480 is vacated and set aside.

We conclude that the judgment entered in No. 75-1479 should also be vacated and set aside. Although the record is not entirely clear, it nonetheless appears to us that prior to the bankruptcy proceeding, the trial judge had granted Davis' motion for summary judgment, both on Globe's claim against Davis and as to the Davis' counterclaim against Globe. However, the judgment itself was not entered until after the bankruptcy proceedings had been instituted. Accordingly, the judgment in No. 75-1479 is vacated and set aside. *Texaco, Inc. v. Liberty National Bank & Trust Company of Oklahoma City*, 464 F.2d 389 (10th Cir. 1972).

FILED

APR 30 1975

REX B. HAWKS

CLERK U. S. DISTRICT COURT

(s) *Irene Higginbotham*

Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

GLOBE CONSTRUCTION CO.,)
a corporation,)
v.)
OKLAHOMA CITY HOUSING)
AUTHORITY et al.,)
and)
GEORGE SEMINOFF, WAYNE L.)
BOWMAN and ALBERT W. BODE,)
Partners, doing business as)
SEMINOFF-BOWMAN-BODE,)
Third Party)
Defendants.)
	No. Civ-73-641-C

MEMORANDUM OPINION

* * *

PRELIMINARY STATEMENT

This action was commenced by the filing of a Complaint by Globe Construction Company against the Oklahoma City Housing Authority, and others, on September 21, 1973. It arises out of a contract dated October 25, 1972, wherein the plaintiff agreed to furnish all labor, material, equipment, and services for the remodeling of the Housing Authority's Will Rogers Courts public housing facility at

Oklahoma City, Oklahoma. Since various allegations were made with regard to extra labor and materials furnished as a result of incomplete or defective plans and specifications prepared by outside architects, the architects were joined as third-party defendants. The remaining parties-defendant constitute subcontractors of plaintiff under its prime contract with the Housing Authority. They filed counterclaims against the prime contractor because of disputes arising between them, including failure to pay in accordance with the terms of the various subcontracts and for extra labor and materials furnished at the insistence of the prime contractor which were outside the provisions of the various subcontracts. General Insurance Company of America as surety under the performance and payment bonds required as a part of the prime contract became a party to the proceedings before November 13, 1973, on which date it filed an Answer to the Counterclaim and Cross-claim of a subcontractor, Jerry W. Taylor. That Answer was filed and executed by R. Brown Wallace of Andrews, Mosburg, Davis, Elam, Legg & Bixler and A. P. Murrah, Jr., appeared with him on the pleading. On the same date, the same counsel filed on behalf of the plaintiff an Answer to the Counterclaim of the Housing Authority, and of various subcontracting parties, and an Entry of Appearance on behalf of General Insurance Company of America. On July 5, 1974, the defendant Housing Authority filed its Amendment to Counterclaim to join General Insurance Company of America on its bond.

With the issues completely joined, pretrial conference was held on July 16, 1974, when the Court was advised by counsel for the various defendants, counterclaimants, and crossclaimants, that discovery responses from the plaintiff had been wholly inadequate, and the case should not be permitted to proceed to trial. At the insistence of Robert E. Andreen, Esq., of Kaminar, Sorbo, Andreen & Thorn, San

Diego, California, chief counsel for the plaintiff, and because of economic injuries being suffered by subcontractors from delay, it was ordered that the matter proceed to trial, commencing July 30, 1974. It was understood and agreed by the Court and by all counsel then of record that the proceedings should be divided into areas of subcontractors' interest (i.e., electrical, painting, etc.) with regard to performance or failure as between the prime contractor and the pertinent subcontractor, which evidence would be considered with regard to that area of the dispute existing between the plaintiff, Globe Construction Company, and the defendant Housing Authority. Issues with regard to delays and cost of completion were to be considered at a second stage.

Trial commenced on July 30, 1974; the plaintiff's exhibits had been marked for identification only by files containing voluminous documentation; the subcontractor defendants had been unable to ascertain, either through discovery or through pleadings, the exact nature and extent of the plaintiff's claims against them. Mr. Andreen appeared as chief counsel for the plaintiff. Mr. Murrah also appeared for the plaintiff and for its surety, General Insurance Company of America.

During opening statement on behalf of the Housing Authority, its counsel indicated it would request leave of Court to amend the defendant's counterclaim to allege that the plaintiff fraudulently induced it to execute the remodeling contract.

The plaintiff elected to proceed first against Adrian F. Statser, d/b/a A & J Electric Company. The Court received evidence pertaining to the plaintiff's Claim Number 36-103-127 and, on August 1, 1974, announced tentative findings with regard to that claim, including a finding that the plaintiff fraudulently induced the electrical subcontractor to execute the pertinent subcontract and the de-

fendant Housing Authority to execute the prime contract. The Court further found the contractor failed to conduct a full and complete inspection of the premises to be remodeled and that the contractor failed to comply with requirements of the contract for procedures in the event of dispute. The plaintiff was specifically informed that it would be provided an opportunity to offer any further evidence, and in fact to reopen and offer additional testimony with regard to Claim Number 36-103-127. The defendant Housing Authority was allowed to offer direct testimony bearing upon the fraudulent conduct of the plaintiff, and the plaintiff was granted the right of reserving cross-examination of the Authority's witnesses and the right to controvert or rebut such evidence and such testimony, and to file appropriate briefs prior to August 20, 1974, when the proceedings were scheduled to recommence.

On August 19, 1974, General Insurance Company of America, surety of the prime contractor, through its new counsel, Mr. Byrne Bowman, requested a continuance to October 1, 1974, in order to permit such new counsel sufficient time for familiarization and preparation. That motion was granted by agreement of the parties, and the proceedings were continued to October 1, 1974. On September 25, 1974, General Insurance Company of America filed an additional motion for continuance to "about December 1, 1974", or until such time as the plaintiff might complete an unrelated construction project in another area. On the same date General Insurance Company of America filed its motion to reopen. The motion for continuance was overruled by order of September 26, 1974, which order provided the motion to reopen would be reconsidered on October 1, 1974, at recommencement of trial. On October 1, 1974, Mr. Bowman announced his client, General Insurance Company of America, had taken control of the plaintiff's action and the defense of claims and cross-claims of the various de-

fendants. Chief counsel for the plaintiff, Mr. Andreen, without leave of Court or courtesy of notice simply failed to appear, and local counsel for both the plaintiff and its surety requested permission to withdraw. Plaintiff's principal stockholder and essential witness also was not present. The Court provided several opportunities for proffers of testimony or other evidence by the plaintiff or its surety, both of whom failed to produce witnesses or documentary evidence. Nor did either the plaintiff or its surety proceed with cross-examination, earlier reserved of witnesses for the Housing Authority in the area of fraudulent inducement. The Court adopted proposed findings of fact and conclusions of law with regard to Claim Number 36-103-127, and reluctantly allowed the withdrawal of Mr. Murrah as counsel for the plaintiff on October 2, 1974. On the following day, when plaintiff, Globe Construction Company, failed to appear by counsel, principal stockholder, witness, or other representative, and in light of the refusal of Mr. Bowman to appear on the plaintiff's behalf, the plaintiff was declared to be in default. On October 4, 1974, the plaintiff's President and principal stockholder, appearing pro se, advised the Court that the plaintiff had filed in the United States District Court for the District of Colorado for relief under Chapter XI of the Bankruptcy Act. Non-jury trial was then conducted to and including October 7, 1974, then recessed to November 25, 1974, when notice was received that a stay of proceedings had been entered by the United States Court of Appeals. The Court of Appeals Order was modified December 4, 1974, to permit recommencement of the proceedings against the surety, and on January 24, 1975, non-jury trial was scheduled to commence February 3, 1975. Following seven additional days of trial, the Court announced judgment.

The proceedings, while complicated, were frustrated by failure of the plaintiff and its surety to avail themselves of discovery procedures after admonishment by the Court,

by the offering of exhibits not properly marked and which had not been offered to opposing counsel for review and possible waiver of identification, by repeated requests for continuance, by refusal of the plaintiff to meet its burden of proof or of going forward with evidence and by efforts on four occasions to invoke the jurisdiction of the Court of Appeals for the issuance of extraordinary writs, including an order to disqualify the Trial Judge. These tactics appeared calculated to impede the conduct of the trial, and if so, had the desired effect.

In spite of the refusal of counsel to adequately prepare for orderly presentation, the Court has received and considered all of the proffered evidence which might be considered relevant or material to the claims of the plaintiff and its surety General Insurance Company of America and of all other parties and makes the following Findings of Fact and Conclusions of Law and concludes that judgment should be entered as hereinafter set forth. Following receipt of all of the evidence, findings of fact and conclusions of law heretofore preliminarily entered are set forth and incorporated herein with suitable modifications.

FINDINGS OF FACT

1. As a result of requisite competitive bidding, the plaintiff, Globe Construction Company, was awarded the contract for the remodeling of Phase I, Project Okla 2-1, Will Rogers Courts, at Oklahoma City, Oklahoma, by the Oklahoma City Housing Authority, a public body corporate and politic.

2. Plans and specifications for the remodeling project were prepared by Seminoff-Bowman-Bode, architects, Oklahoma City, Oklahoma. Such plans were intended to be suggestive, only; they were intended to illustrate the completed work, and not to display existing conditions. The plaintiff contractor was required to inspect the 40-year-old

buildings to be remodeled and to familiarize itself with conditions relating to construction and labor, warranting that it would assert no claims because of conditions regarding which it should have been on notice as a result of such inspection. It warranted that it had made such an inspection, and fully acquainted itself with conditions relating to construction and labor. The contractor was also required to check existing dimensions and all details. With specific regard to electrical work, the contract provided that electrical system layouts indicated on the drawings were generally diagrammatic and that location of outlets and equipment should be governed by structural conditions and obstructions.

3. General standards prevailing in this community with regard to remodeling of an existing structure or structures impose upon the prime contractor the duty to examine the structure or structures to ascertain by proper investigation defects or obstructions it might encounter during the course of construction, and to include in its bid an amount sufficient to compensate it for the accomplishment of the work and materials required thereby.

4. The plaintiff Globe Construction Company failed to conduct an inspection and examination of the structures to be remodeled to the extent imposed upon it by the provisions of the contract, including the plans and specifications, and imposed by the standards in the community.

5. During the progress of construction, the plaintiff encountered certain conditions which it alleges required the expenditure of additional sums for labor and materials. The conditions referred to by plaintiff in its Claim Number 36-103-127, for which it claims extra compensation in the amount of \$21,045.26, involves electrical junction boxes embedded in concrete floors of the buildings. None of the parties involved herein, to-wit, the plaintiff, Globe Construction Company, the defendant, Oklahoma City Housing

Authority, the defendant, Adrian Statser, d/b/a A & J Electric Company, and the third party defendants, Seminoff-Bowman-Bode had knowledge of the embedded junction boxes. At least fifty percent of the junction boxes were exposed, and would have been visible to the plaintiff upon adequate inspection of the job site as required by the contract. It could and should have anticipated that additional labor and materials would have to be expended for electrical work and should have increased its competitive bid accordingly. The plaintiff was obligated to discover the existence of the junction boxes during the course of its inspection, and was further under an obligation and duty to reveal the presence of them to the electrical subcontractor, A & J Electric Company.

6. The plaintiff intentionally, willfully, materially and falsely represented to the defendant, Oklahoma City Housing Authority, that it would comply with the terms of the construction contract for the amount of its bid, to wit, the sum of \$889,388.00, and that its President, G. K. Ward, would personally supervise the construction job "full time". The Court specifically finds that the plaintiff never intended to perform the construction contract according to its terms, but rather intended to rely upon asserted deficiencies in the plans and specifications in order to profit from change orders to the contract resulting in substantial increase in price; nor did it ever intend that its President, G. K. Ward, would provide full-time supervision.

7. The plaintiff, Globe Construction Company, fraudulently induced the defendant, A & J Electric Company, its subcontractor, to enter into the electrical subcontract by material and false misrepresentation, known by the plaintiff to be false.

8. In direct violation of its executed Non-Collusion Affidavit, plaintiff conspired, colluded, and agreed both directly and indirectly to put in sham bids, and sought by

agreement or collusion to fix the bid price of other bidders, and thereby secured an advantage against the defendant, Oklahoma City Housing Authority.

9. The plaintiff failed to comply with the requirements contained in the construction contract concerning the procedure for change orders, and further failed to comply with the provisions set forth requiring presentation in writing to the contracting officer for decision all disputes and all claims for alleged breach of contract.

10. The plans and specifications for the Will Rogers Courts, prepared by Seminoff-Bowman-Bode, were prepared in a reasonable and prudent manner and in accordance with the standard of care exercised by other architects in this community. They were prepared in such a manner that they could be reasonably interpreted and followed by any reasonably competent contractor.

11. The contractor failed to complete its work diligently and in a workmanlike, orderly manner.

12. The contractor failed to fully acquaint itself with conditions relating to construction at the job site.

13. The contractor failed to negotiate the value of extra or omitted work in advance, and to state such value in a change order describing the nature and extent of the change, or to await a proceed order from the Housing Authority stating the manner in which the value of any change would be determined.

14. The contractor made changes in the work without a written change order from the defendant Housing Authority, approved on its face by the Department of Housing and Urban Development, and in the absence of an emergency or written order, made changes that were not necessary for the protection of life and property.

15. The plaintiff failed to protest to the contracting officer with regard to claims for extra costs or extension of time within ten (10) days after receipt of instructions involving such extra cost or extension of time.

16. The plaintiff contractor failed, within ten (10) days from the beginning of delays caused by weather, by any act or neglect of the local authority, or by changes in the work, to notify the contracting officer of the cause and extent of such delays.

17. The plaintiff failed to present to the contracting officer for decision, in writing, all disputes and all claims for alleged breach of contract within ten (10) days following commencement of such disputes.

18. The plaintiff contractor failed to provide proper protection for existing work which was open or exposed during the course of construction and failed to protect its work from damage and the owner's property from injury or loss.

20. The plaintiff contractor failed to provide for temporary electric service and water service needed during the construction and failed to provide temporary local heating where needed to prevent injury and damage from dampness or cold.

21. The contractor failed to complete the work called for by the contract within 180 consecutive calendar days from the date of notice to proceed, October 1, 1973, including time extensions of 21 days granted by the Housing Authority.

22. The contractor failed to provide adequate supervision for the work in progress, resulting in complete failure of coordination between subcontracting crafts and unnecessary and unreasonable delays.

23. The contractor failed to timely supply materials required to be furnished by him, under the terms of various subcontracts, which failure resulted in further unreasonable and unnecessary delays and rendered coordination and contact between crafts impossible.

24. The claims of the contractor, identified by control numbers, as indicated below, resulted from failure of the contractor in one or more of the areas of non-compliance set forth in the preceding findings. The claims are denoted by claim number and description of work as follows:

Globe Control Number	Brief Description
36-103-103/108	Plastering behind convex Misc. plastering/replacing of nipples
36-103-104/112	Replacement of Exterior glazing
36-103-109/111	Hollow door frames
36-103-110	Outside overhead electrical work
36-103-114	Uniform white birch doors
36-103-115	Time extensions
36-103-117	Boiler bases
36-103-119/136	Piping to panel distribution boxes
36-103-120	Kitchen drains
36-103-121	Off-street parking permit
36-103-122	Plaster patching
36-103-123	Drapery rod mounting boards
36-103-125	Preparation of paint surfaces

36-103-126	Field change order— mechanical
36-103-127	Wiremold
36-103-129	Steel door frames
36-103-134	2-way switches
36-103-140	Junction boxes

Complete details with regard to each of the foregoing items are contained in exhibits offered by General Insurance Company of America and received by the Court.

25. Claims for time extensions on account of weather, delay in approval of submittals, and all other claims for delays resulted from failure of performance by the prime contractor and not by failure on the part of any subcontractor or of the defendant, Housing Authority. Progress of the work was not delayed by inclement weather, except to the extent of 16 days allowed by the defendant, Housing Authority.

26. The procedure which the defendant, Housing Authority, is required to utilize in arriving at rentals to be paid for its units, together with the presence or absence of available tenants who are eligible, and the amount of rentals to be paid by such tenants, renders the assessment of exact actual damages extremely difficult. Damages cannot be measured with an exact degree of accuracy but are not, on the face of the contract in suit, out of proportion to probable loss.

27. The Court concludes that the defendant, Oklahoma City Housing Authority, should have and recover judgment as against the General Insurance Company of America, as surety on the performance bond of the plaintiff, Globe Construction Company, in the amount of \$177,504.00 being liquidated damages as provided in the construction contract calculated from extended completion date of May 20, 1973,

to actual date of completion on January 11, 1974, except as to Buildings 51 and 52 which were accepted July 25, 1973. The Housing Authority should also have and recover an amount of \$1,858.71 for deletion of a parking lot the contractor was not required to install, and \$75,000.00 for the use and benefit of its attorney, William B. Rogers, as a reasonable fee for services performed on behalf of his client herein; the sum of \$10,070.53 for the use and benefit of John R. Couch and Hugh M. Baysinger, as counsel for third-party defendants, Seminoff-Bowman-Bode. From this amount, General Insurance Company of America is entitled to credit in the amount of \$1,685.88 for net profit due the contractor on field change orders for which payment has been rendered to Matherly Mechanical Contractors in the amount of \$28,097.63.

28. Following receipt of notice that its bid had been accepted, the plaintiff executed contracts for work to be performed by various subcontractors. Almost immediately disputes between the prime and the subcontractors commenced. Findings and conclusions with regard to those disputes are set forth hereafter.

Builders Specialty, Inc.

29. The subcontract with this defendant called for furnishing of labor and material for installation of gypsum board, dry and metal studs, installation of steel door jambs, and acoustical ceilings. By an executed change order, Builders Specialty was directed, in addition, to install 504 new wood interior doors at \$6.00 per door for a total increase to the subcontract price of \$3,024.00. Subsequently, the plaintiff directed the subcontractor to furnish additional labor and material, not called for by the subcontract, as amended by Change Order No. 1, by mortising the new wood doors and installation of wall molding, for which the subcontract price should have been increased an additional

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sum of \$1,059.39. In addition, the plaintiff failed to supply proper sized steel door jambs for installation by Builders Specialty, resulting in damages in the additional amount of \$2,778.30. About May 31, 1973, the plaintiff breached its subcontract with this defendant by failing to timely pay the defendant for 90% of the work, labor and materials furnished by defendant under its contract, even though the plaintiff had received payment from the defendant Housing Authority.

By reason of the aforesaid, the defendant, Builders Specialty, should recover as against the surety the sum of \$20,181.69, from which should be deducted credits for 70 doors not installed by Builders Specialty having a fair and reasonable cost of \$245.00, for acoustical ceiling not installed having a fair and reasonable cost to Builders Specialty of \$700.00, and for \$64.00 being the reasonable cost of performance of punch list items by the defendant, Housing Authority, and for payments made to the subcontractor in the amount of \$13,806.87, leaving a total balance due of \$5,392.82. The defendant, Builders Specialty, Inc., is entitled to recover the amount of \$5,380.82 with interest from August 10, 1973, and reasonable attorneys' fees in the amount of \$6,190.00 and all costs expended herein.

Rock Creek Home Center, Inc.

30. This subcontract was not executed until February 16, 1973. It involves prefabrication and installation of partially new and a modification of existing kitchen cabinets. The contractor required additional performance increasing the value of performance to \$39,973.59. Again, the contractor failed to timely make progress payments for which it had been paid. Having been denied payment, Rock Creek Home Center, Inc., terminated its contract and abandoned the work on August 15, 1973, at which time it had completed 80% of the work it had agreed to perform. It received only

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\$15,437.00 in payment from the prime contractor, leaving a balance due of \$15,959.35, and is entitled to recover that amount, with interest commencing August 15, 1973, and costs expended herein including reasonable attorneys' fees in the amount of \$6,000.00.

Matherly Mechanical Contractors, Inc.

31. This contract for plumbing, heating, and other mechanical work, required performance for compensation of \$315,000.00, of which the contractor paid only \$275,580.79, leaving a balance due of \$39,419.21. Additional work was done by Matherly outside the scope of the prime contract and of its subcontract in the amount of \$28,097.63, representing field change orders. It received payment from the owner, Housing Authority, during the course of litigation by stipulation of the parties concerned. It also performed additional work at the direction of the prime contractor, having a value of \$2,108.62, for which it has not been paid, for a total balance due this subcontractor of \$41,527.83, less agreed credits due the prime contractor of \$366.40. It should have judgment for \$41,161.43, with interest thereon from September 17, 1973, the date it completed its work, and for costs expended herein, including reasonable attorneys' fees in the amount of \$15,000.00.

Adrian F. Statser, d/b/a A & J Electric Company

32. This defendant-electrical subcontractor performed its contract in full and was required by the plaintiff to perform additional work in the amount of \$48,263.52. The balance of the original contract price due the subcontractor is \$66,846.20, with a balance due of \$115,109.72, which amount it is entitled to recover, with interest from September 20, 1973, the date the prime contract was terminated by defendant, Housing Authority, and reasonable attorneys' fees in the amount of \$25,000.00.

M.C.S. Services, Inc.

33. This painting subcontractor is due the unpaid balance on its original subcontract price in the amount of \$13,622.00. It did additional glazing at the direction of the plaintiff, having a value of \$3,260.00, and was required to do painting not called for by the terms of the subcontract resulting from damage by the plaintiff to surfaces already painted in the amount of \$18,500.00. It is entitled to judgment in the amount of \$35,382.00, with interest from September 20, 1973, and all costs expended herein, including reasonable attorneys' fees in the amount of \$8,000.00.

*Jerry W. Taylor,
a/b/a Concrete Construction Company*

34. This concrete subcontractor is due an unpaid balance on its subcontract price of \$3,500.00, less credit for installation of sidewalks not properly installed by the subcontractor of \$1,851.78, leaving a balance due of \$1,648.22, for which the subcontractor is entitled to judgment with interest from September 20, 1973, and costs expended herein, including reasonable attorneys' fees in the amount of \$500.00.

Bill Cox, d/b/a Home Improvement Company

35. The balance due this subcontractor on his original contract price is \$4,700.00, for which it is entitled to judgment with interest from September 20, 1973, and a reasonable attorneys' fee in the amount of \$1,250.00.

Kenneth E. Ballard, d/b/a Ballard Fence Company

36. Ballard has a balance due under its subcontract of \$1,410.00 and is entitled to recover that amount with interest from September 20, 1973, and a reasonable attorneys' fee in the amount of \$500.00.

Southwest Electric Co., Inc.

37. Southwest Electric Co., Inc., furnished transformers to the prime contractor having a value of \$2,945.80, which were items of equipment required to be furnished by the defendant, Adrian F. Statser, d/b/a A & J Electric Company. Upon payment of the transformer cost to Southwest Electric Co., Inc., credit should be issued the surety as against the judgment of Adrian F. Statser.

38. The plaintiff and its surety failed to prove by a preponderance of the evidence any claim or back charges against the subcontracting parties for breach of contract, for delay in performance or for failure to furnish and install labor and materials in compliance therewith, except as herein specifically allowed. The evidence shows clearly that each of said subcontractors performed its contract work according to the terms and conditions of its respective subcontract, and they are entitled to recover accordingly.

CONCLUSIONS OF LAW

1. The General Insurance Company of America, as surety on the performance bond of the plaintiff, Globe Construction Company, having asserted the claims and defenses of the plaintiff, should have and recover nothing as against the defendant, Oklahoma City Housing Authority or the subcontractor-defendants and intervenors, on its Complaint, as amended, including permissive amendment in conformity with the proof.

2. General Insurance Company of America, as surety upon the bonds of the principal, Globe Construction Company, the plaintiff herein, is jointly and severally liable with the plaintiff for claims for labor and materials furnished in prosecution of the work required and for performance of the contract according to its terms. The bankruptcy proceedings filed by the plaintiff, while operating as

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a stay of any proceedings against the plaintiff, do not affect the right of the parties to proceed as against General Insurance Company of America, as surety for the plaintiff, for labor and materials furnished by subcontractors, and for performance of the prime contract.

3. The defendant and intervening subcontractor-parties hereto should have and recover judgment against the General Insurance Company of America, as surety on the statutory and payment bond of the plaintiff, Globe Construction Company, as follows:

a. Rock Creek Home Center, Inc., the sum of \$15,959.35, with interest from August 15, 1973, and costs, including reasonable attorneys' fees in the amount of \$6,000.00;

b. Matherly Mechanical Contractors, the sum of \$41,161.43, with interest from September 17, 1973, and costs, including attorneys' fees in the amount of \$15,000.00;

c. Builders Specialty, Inc., the sum of \$5,380.82, with interest from August 10, 1973, and costs, including reasonable attorneys' fees in the amount of \$6,190.00;

d. Adrian F. Statser, d/b/a A & J Electric Company, the sum of \$115,109.72, with interest from September 20, 1973, and costs, including reasonable attorneys' fees in the amount of \$25,000.00;

e. M.C.S. Services, Inc., the sum of \$35,382.00, with interest from September 20, 1973, and costs, including reasonable attorneys' fees in the amount of \$8,000.00;

f. Jerry W. Taylor, d/b/a Concrete Construction Company, the sum of \$1,648.22, with interest from September 20, 1973, and costs, including attorneys' fees in the amount of \$500.00;

[APPENDIX]

g. Bill Cox, d/b/a Home Improvement Company, the sum of \$4,700.00 with interest from September 20, 1973, and costs, including attorneys' fees of \$1,250.00;

h. Kenneth E. Ballard, d/b/a Ballard Fence Company, the sum of \$1,410.00, with interest from September 20, 1973, and costs, including reasonable attorneys' fees of \$500.00;

i. Southwest Electric Co., Inc., the sum of \$2,945.80 to be credited against the judgment herein rendered in favor of Adrian F. Statser, d/b/a A & J Electric Company.

DATED this 30th day of April, 1975.

s/ Stephen S. Chandler
UNITED STATES DISTRICT JUDGE

FILED
APR 30 1975
REX B. HAWKS
CLERK U. S. DISTRICT COURT
(s) Irene Higginbotham
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

GLOBE CONSTRUCTION COMPANY,)
Plaintiff,)
v.) No. Civ-73-641-C
OKLAHOMA CITY HOUSING)
AUTHORITY, et al,)
Defendants.)

FINAL JUDGMENTS ON ALL ISSUES
AS TO ALL PARTIES

Having considered all pleadings, stipulations, oral testimony and documentary evidence, in a series of trial sessions, and having announced from the bench the Court's final determination of all issues as to all parties, the Court adjudges and decrees judgments in favor of the following parties against General Insurance Company of America, which judgments are ordered entered in accordance with Federal Rule of Civil Procedure No. 54(b):

<u>Party</u>	<u>Principal Amount</u>	<u>Attorney Fee</u>	<u>Total</u>
Oklahoma City Housing Authority	\$187,747.36	\$75,000.00	\$262,747.36
Adrian Statser, d/b/a A & J Electric Company	\$115,109.72	\$25,000.00	\$140,109.72
Kenneth E. Ballard, d/b/a Ballard Fence	\$1,410.00	\$500.00	\$1,910.00

Jerry Taylor, d/b/a Concrete Construction Company	\$1,648.22	\$500.00	\$2,148.22
Bill Cox, d/b/a Home Improvement Co.	\$4,700.00	\$1,250.00	\$5,950.00
MCS Services, Inc. (Maddox Paint Contracting Company)	\$35,382.00	\$8,000.00	\$43,382.00
Matherly Mechanical Contractors, Inc.	\$41,161.43	\$15,000.00	\$56,161.43
Rock Creek Home Center, Inc.	\$15,959.35	\$6,000.00	\$21,959.35
Southwest Electric Company, the sum of \$2,945.80 to be credited against the judgment herein rendered in favor of Adrian F. Statser, d/b/a A & J Electric Company when paid by General Insurance Company of America.			

IT IS SO ORDERED AND ADJUDGED.

The Court previously signed (and the Clerk entered on the docket sheet) the following judgments against GENERAL INSURANCE COMPANY OF AMERICA:

<u>Date</u>	<u>Party</u>	<u>Principal Amount</u>	<u>Attorney Fee</u>	<u>Total</u>
1/6/75	Ray Davis, d/b/a Pioneer Floor Company	\$6,011.93	\$1,000.00	\$7,011.93
2/25/75	Builders Specialty, Inc.	\$5,380.82	\$6,190.00	\$11,570.82

Having determined all issues as to all parties, the Court orders that said judgments now be entered in accordance with Rule 54(b).

[APPENDIX]

The Court previously signed (and the Clerk entered on the docket sheet) the following judgments against GLOBE CONSTRUCTION COMPANY:

<u>Date</u>	<u>Party</u>	<u>Amount</u>
8/19/74	Ray Davis, d/b/a Pioneer Floor Company	\$6,011.93
8/22/74	Oklahoma Tile Company	\$2,194.00
10/1/74	A. J. Statser, d/b/a A & J Electric Company	\$19,657.44
10/7/74	Oklahoma City Housing Authority Liquidated Damages \$177,504 Exemplary Damages \$250,000	\$427,504.00
10/7/74	Ray Davis, d/b/a Pioneer Floor Company	\$1,000.00

Having determined all issues as to all parties, the Court orders that said judgments now be entered in accordance with Rule 54(b).

This constitutes a final determination and adjudication of all issues as to all parties; and, accordingly, the Clerk is directed to forthwith enter said judgments in accordance with Rule 54(b).

Dated this 30th day of April, 1975.

s/ Stephen S. Chandler
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET ON
APR 30 1975

By: CATHY JUNE JUSTICE

[APPENDIX]

FILED

APR 30 1975

REX B. HAWKS

CLERK, U. S. DISTRICT COURT

(s) Irene Higginbotham

Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE

WESTERN DISTRICT OF OKLAHOMA

GLOBE CONSTRUCTION COMPANY,)

Plaintiff,)

v.

) No. Civ-73-641-C

OKLAHOMA CITY HOUSING)

AUTHORITY, et al,)

Defendants.)

SUPPLEMENT TO FINAL JUDGMENTS
ON ALL ISSUES AS TO ALL PARTIES

Through inadvertence there was omitted from the list of those entitled to judgment against General Insurance Company of America on the first page of the Judgment filed on April 30, 1975, the following:

<u>Party</u>	<u>Principal Amount</u>	<u>Attorney Fee</u>	<u>Total</u>
Oklahoma Tile Company	\$2,194.00	\$750.00	\$2,944.00

for which sum the Court had theretofore entered judgment and said Final Judgments On All Issues As To All Parties is so amended to include said judgment in favor of Oklahoma Tile Company.

s/ Stephen S. Chandler
UNITED STATES DISTRICT JUDGE
ENTERED IN JUDGMENT DOCKET ON
APR 30 1975
By: CATHY JUNE JUSTICE

[APPENDIX]

FILED
APR 30 1975
REX B. HAWKS
CLERK, U. S. DISTRICT COURT
(s) Irene Higginbotham
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

GLOBE CONSTRUCTION COMPANY,)

Plaintiff,)
v.) No. Civ-73-641-C
)

OKLAHOMA CITY HOUSING)
AUTHORITY, et al,)

Defendants.)

SUPPLEMENT TO FINAL JUDGMENTS
ON ALL ISSUES AS TO ALL PARTIES

Through inadvertence there was omitted from the list of those entitled to judgment against General Insurance Company of America on the first page of the Judgment filed on April 30, 1975, the following:

Party	Principal	Attorney	Amount	Fee	Total
Oklahoma Tile Company	\$2,194.00	\$750.00	\$2,944.00		

for which sum the Court had theretofore entered judgment and said Final Judgments On All Issues As To All Parties is so amended to include said judgment in favor of Oklahoma Tile Company.

s/ Stephen S. Chandler
UNITED STATES DISTRICT JUDGE
ENTERED IN JUDGMENT DOCKET ON
APR 30 1975

By: CATHY JUNE JUSTICE

[APPENDIX]

FILED
IN OPEN COURT
OCT 7 1974
REX B. HAWKS
CLERK, U. S. DISTRICT COURT
(s) Irene Higginbotham
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

GLOBE CONSTRUCTION CO.,)
a corporation,)

Plaintiff,)

v.)

OKLAHOMA CITY HOUSING)
AUTHORITY et al.,)

Defendants,)
and)

GEORGE SEMINOFF, WAYNE L.)
BOWMAN and ALBERT W. BODE,)
Partners, doing business as)
SEMINOFF-BOWMAN-BODE,)
Third Party)
Defendants.)

JUDGMENT

This Cause came on regularly to be heard the 1st day of October, 1974, before the undersigned District Judge, having been continued to said date by Order of this Court, the Plaintiff Globe Construction Company appearing by its attorney, A. P. Murrah, Jr., the Defendant Oklahoma City Housing Authority appearing in person and by its attorney, William B. Rogers, the Defendants, MCS Services, Inc. and A. J. Statser d/b/a A & J Electric Company, appearing in person and by their attorney, Clyde J. Watts, the General

[APPENDIX]

Insurance Company of America appearing in person and by its attorneys of record, A. P. Murrah, Jr. and Byrne A. Bowman, the Third-party Defendants, Seminoff-Bowman-Bode appearing in person and by their attorneys Hugh A. Baysinger and John R. Couch.

Whereupon A. P. Murrah, Jr. moves the Court to withdraw as attorney of record for Globe Construction Company and for General Insurance Company of America, and the Court takes such motion under advisement, requesting said counsel to continue in order to permit Globe Construction Company to obtain other counsel, Robert A. Andreen, counsel of record for Globe Construction Company, appears not.

Whereupon, the proceedings continue to October 2, 1974, with all remaining parties represented as hereinabove set forth, the Plaintiff Globe Construction Company being present in person by its President, G. K. Ward, at which time A. P. Murrah, Jr. was granted permission to withdraw as counsel of record for Globe Construction Company and General Insurance Company of America, and the Court proceeded to hear the evidence and these proceedings continued to October 3, 1974.

The Plaintiff, Globe Construction Company appears neither in person nor by counsel, and upon motion by the Defendant, Oklahoma City Housing Authority, said Plaintiff is declared to be in default.

Now on this 4th day of October, 1974, the Motion of the Defendant, Oklahoma City Housing Authority, for Judgment by reason of the default of the Plaintiff, Globe Construction Company, as against said Plaintiff, is sustained.

It is therefore ordered judged and decreed by the Court that the Plaintiff, Globe Construction Company, recover nothing by virtue of its action against the Defendant, Oklahoma City Housing Authority, and that said Defend-

[APPENDIX]

ant, Oklahoma City Housing Authority, have and recover Judgment as against the Plaintiff, Globe Construction Company upon its counter-claim, as amended, in the amount of \$177,504.00 for liquidated damages, and for \$250,000.00 as punitive or exemplary damages, for reasonable attorney's fees, to be fixed by the Court, for interest as provided by law, for costs, and for all costs expended herein.

Dated this 7th day of October, 1974.

s/ Stephen S. Chandler
UNITED STATES DISTRICT JUDGE

F I L E D
AUG 11 1975
REFEREES IN BANKRUPTCY
DISTRICT OF COLORADO

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLORADO

In re)
)
GLOBE CONSTRUCTION CO.,) IN PROCEEDINGS FOR
) AN ARRANGEMENT
) No. 74 B 3023
Debtor.)

MEMORANDUM OPINION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER DENYING
CLAIM OF OKLAHOMA CITY HOUSING
AUTHORITY

THIS MATTER is before the Court upon the objection of the Debtor to the claim filed herein by the Oklahoma City Housing Authority in the amount of \$427,504.00, plus attorneys' fees, costs, interest, etc., incurred in a certain Civil Action in the United States District Court for the Western District of Oklahoma. It appears from the record

[APPENDIX]

that this proceeding was filed on October 3, 1974, at which time there was pending a lawsuit before the Honorable Stephen S. Chandler, United States District Judge for the Western District of Oklahoma. Upon the filing of this proceeding, the counsel for the Debtor in the Oklahoma matter was permitted to withdraw; and upon the failure within a very short period of time of the Debtor to secure new counsel, a default judgment was entered therein in the amount of \$177,504.00 liquidated damages and \$250,000.00 punitive or exemplary damages and for attorneys' fees, interest and costs. At the hearing in this matter upon the objection to the claim and at several continuances thereof, the Oklahoma City Housing Authority failed to appear, apparently relying upon the judgment entered by Judge Chandler in the Oklahoma proceeding.

The evidence taken by the Court indicates that sufficient setoffs exist between the Debtor and the Oklahoma City Housing Authority so as to conclude that upon the merits of the claim now embodied in the judgment in Oklahoma, no liability from the Debtor to the Oklahoma City Housing Authority exists. The question, therefore, before the Court is whether upon these facts the Court should give credence to the judgment entered in Oklahoma after the date of filing of the petition herein, or whether the Court should proceed to determine the matter upon the merits and enter judgment on the claim accordingly.

At 3A Collier § 63.11 at Page 1835, it is stated:

A judgment rendered after the institution of bankruptcy proceedings stands on a different footing. A judgment *in rem*, rendered in a suit pending at the time the petition was filed, will bind the trustee to the same extent as any other person who succeeds to an interest in property pending litigation. But a judgment *in personam* is binding on the trustee when later

[APPENDIX]

presented as a claim only if the trustee or receiver was made a party and directed by the bankruptcy court to defend the suit. And even if the trustee is made a party, but at too advanced a stage to afford an opportunity to inquire into the merits—as, for instance, after a judgment had been rendered by default and the term of the court meanwhile expired—the bankruptcy court may refuse to be bound by the judgment and require the creditor to file his proof on the facts underlying the judgment rather than on the judgment itself.

Section 63 of the Bankruptcy Act provides that debts of the bankrupt may be proved and allowed which are founded upon

(1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date . . . (5) provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments . . .

Section 314 of the Act provides that the Court may stay until final decree the commencement or continuation of suits, and Rule 11-44 of the Bankruptcy Rules supplements and reinforces the policy of Section 314 by making such stay automatic until relief therefrom is sought. It is generally settled that the position of a debtor in possession under Chapter XI of the Act clothes the debtor with the same powers and rights of a trustee in a liquidating bankruptcy under Chapters I through VII of the Act, and Section 63 is generally incorporated by reference into proceedings under Chapter XI.

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A leading case very much on point with the instant case is *Greenberg v. Paramount Pictures, Inc.*, arising out of the reorganization proceeding under former Section 77B of the Bankruptcy Act of Paramount Publix Corporation [85 F.2d 42 (2nd Cir. 1936)], where in an opinion by Judge L. Hand, the Court states:

In spite of the reservation in *Riehle v. Margolies*, 279 U.S. 218, 219, in the note to page 228, 49 S.Ct. 310, 314, 73 L.Ed. 669, we take it as law that a judgment obtained after bankruptcy petition filed does not liquidate a claim for purposes of distribution. *In re Brady Foundry Co.*, 3 F. (2d) 437 (C.C.A. 7); *In re Barrett & Co.* (D.C.) 27 F.(2d) 159, affirmed 29 F.(2d) 737 (C.C.A. 5); *In re Hoey, Tilden & Co.* (D.C.) 292 F. 269; *In re Service Appliance Co.* (D.C.) 39 F.(2d) 632; *In re Kenwood Storage & Warehouse Corporation* (D.C.) 4 F. Supp. 561. The fact that section 63b, Bankr. Act (11 U.S.C.A. § 103 (b)), allows unliquidated claims to be liquidated "in such manner as it" (the court) "may direct," would seem to give it control over liquidation. See, also, section 11 and section 57d (11 U.S.C.A. §§ 29, 93 (d)). Therefore, except for the reorganization proceeding, the judgment creditor would have had to prove his claim before the referee, or in some other way chosen by the court under section 63b. The question is whether a claim in reorganization, based upon a judgment obtained pending the bankruptcy, is in a different class. If all the creditors are to be paid in full, there would be more ground for saying so; the debtor had its opportunity to contest the action and chose to allow a default, and it alone has any interest in the reorganization. But where, as here, creditors must abate their claims, the result is to introduce among them an unwarranted, or overblown, claim which they have never had any chance to contest. The bankruptcy trustee has no apparent interest in doing so, for the

[APPENDIX]

outcome of the action concerns only the bankrupt; he should not be asked to divine the possibility of a future reorganization, and if he did, it would be an unreasonable imposition to require him to take measures against so remote a hazard.

To a like effect is *Marks v. Brucker*, 434 F.2d 397 (9th Cir. 1970).

It, therefore, appears that the Debtor in Possession having failed to proceed in the litigation in Oklahoma and a default judgment therein entering within a few days after the filing of the petition herein and the Oklahoma City Housing Authority having proceeded to take a default judgment therein in violation to the stay imposed by Rule 11-44 pursuant to the provisions of Section 314 of the Act, the judgment entered post-petition cannot be construed as binding upon the estate herein. To permit otherwise would be to permit a claim of large amount entered in a non-contested proceeding to operate to the detriment of the creditors as a whole.

The Court then must turn to the evidence taken, and it appearing that no liability from this Debtor to the Oklahoma City Housing Authority exists in view of the setoffs available to the Debtor, Claim No. 25 filed by the Oklahoma City Housing Authority should be disallowed.

WHEREFORE, IT IS ORDERED that Claim No. 25 filed by the Oklahoma City Housing Authority be and the same is hereby disallowed.

DONE at Denver in said District this 11th day of August, 1975.

BY THE COURT:
Glen E. Keller, Jr.
Bankruptcy Judge

United States District Court
For the _____ District of COLORADO

In re: _____
GLOBE CONSTRUCTION Co., _____ Bankruptcy No. 74-B-3023
Bankrupt* _____

PROOF OF CLAIM

1. [If claimant is an individual claiming for himself] The undersigned, who is the claimant herein, resides at **.

[If claimant is a partnership claiming through a member] The undersigned, who resides at **, is a member of _____, a partnership, composed of the undersigned and _____, of ** _____, and doing business at ** _____, and is authorized to make this proof of claim on behalf of the partnership.

[If claimant is a corporation claiming through an authorized officer] The undersigned, who resides at ** 1716 Drakestone Avenue, Oklahoma City, Oklahoma 73120, is the Executive Director of The Oklahoma City Housing Authority, a corporation organized under the laws of the State of Oklahoma, and doing business at ** 501 Couch Drive, Oklahoma City, Oklahoma 73102, and is authorized to make this proof of claim on behalf of the corporation.

[If claim is made by agent] The undersigned, who resides at ** _____, is the agent of _____, of ** _____, and is authorized to make this proof of claim on behalf of the claimant.

2. The bankrupt was, at the time of the filing of the petition initiating this case, and still is indebted [or liable] to this claimant, in the sum of \$427,504.00, plus attorney's

fees, costs, interest, and costs expended in CIV-73-641-C, USDC, Western Dist. of Oklahoma.

3. The consideration for this debt [or ground of liability] is as follows:

Judgment of the abovenamed Court, in CIV-73-641-C, dated October 7th, 1974, signed by the Honorable Stephen S. Chandler.

4. [If the claim is founded on writing] The writing on which this claim is founded (or a duplicate thereof) is attached hereto.

5. [If appropriate] This claim is founded on an open account, which became [or will become] due on _____, as shown by the itemized statement attached hereto. Unless it is attached hereto or its absence is explained in an attached statement, no note or other negotiable instrument has been received for the account or any part of it.

6. No judgment has been rendered on the claim except: litigation in this case is not yet complete.

7. The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

8. This claim is not subject to any setoff or counter-claim except _____.

9. No security interest is held for this claim except [If security interest in property of the debtor is claimed] The undersigned claims the security interest under the writing referred to in paragraph 4 hereof [or under a separate writing which (or a duplicate of which) is attached hereto, or under a separate writing which cannot be attached hereto for the reason set forth in the statement attached hereto]. Evidence of perfection of such security interest is also attached hereto.

10. This claim is a general unsecured claim, except to the extent that the security interest, if any, described in

(APPENDIX)

paragraph 9 is sufficient to satisfy the claim. [If priority is claimed, state the amount and basis thereof.]

OKLAHOMA CITY HOUSING AUTHORITY

Dated: Signed: (s) George D. Ormiston
By: George Ormiston,
Executive Director

Penalty for Presenting Fraudulent Claim. Fine of not more than \$5000 or imprisonment for not more than 5 years or both—Title 18, U.S.C., §152.

FILED
NOV 5 1974
REFEREES IN BANKRUPTCY
DISTRICT OF COLORADO

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLORADO

THIS MATTER coming on to be heard on the Petition of General Insurance Company of America/Safeco Insurance Company of America (General), the primary creditor of the Debtor in possession, and the Court having received testimony of the Debtor and considered the statements of counsel and the data offered by the Debtor, the Court

FINDS:

1. All or substantially all of the assets of the Debtor in possession are involved (1) in an effort to complete a contract for rehabilitation work at Fort Sill, Oklahoma with the Corp of Engineers, or (ii) in the Debtor's defense of counterclaims and intervenors' claims now being prosecuted

APPENDIX

in the United States District Court at Oklahoma City. The orderly administration of the Debtor's estate, the reasonable recoveries from the Debtor's assets and indeed avoidance of the total collapse of the Debtor, requires that time be allowed the Debtor and its chief executive officer, G. K. Ward, to complete its said contract at Fort Sill, Oklahoma, and also to prepare its defense of complicated issues in litigation before Judge Chandler, Judge of the United States District Court of Oklahoma City.

2. The stay of claims against the Debtor will not achieve the necessary result if those claims are prosecuted against the Surety, "General", which in turn is indemnified for all liabilities, judgments and expense arising out of its bonds written for the Debtor.
3. The completion of work at Fort Sill is of paramount and immediate importance. It is to the best interest of the Debtor and its creditors, including General, as well as such creditors in Oklahoma as the intervening subcontractors and the Housing Authority, itself, that the Debtor's time in the next ninety (90) days be devoted to the completion of its work at Fort Sill, rather than the preparation of the defense of Debtor and Surety in the pending litigation at Oklahoma City.
4. To enable this Court to discharge its obligations under the Bankruptcy Act, including the protection and recovery of the Debtor's assets, tangible and intangible, and the marshalling of the claims of the Debtor's creditors, it is necessary that a stay be granted against the prosecution of the claims in Civil Action No. 73-641-C pending before the United States District Court for Oklahoma at Oklahoma City as against both the Debtor and its Surety.

NOW, THEREFORE, IT IS ORDERED that all claimants against the Debtor now prosecuting or hereafter to prosecute claims in the United States District Court for

[APPENDIX]

Oklahoma City in Civil Action No. 73-641-C, or otherwise, are specifically enjoined and stayed from the prosecution of their claims, directly or indirectly, against either the Debtor or its Surety, General Insurance Company of America or Safeco Insurance Company of America. This Order shall remain in full force and effect for a period of ninety (90) days following November 25, 1974, unless hereafter modified upon motion of any claimant and hearing thereon. This Order shall be served upon all such claimants by certified mail and by filing a copy hereof with the Clerk of the United States District Court for the District of Oklahoma.

DATED: November 5, 1974

BY THE COURT
s/ Glen E. Keller, Jr.
Bankruptcy Judge

JANUARY TERM — JANUARY 31, 1975

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., and Honorable William E. Doyle, Circuit Judges

GLOBE CONSTRUCTION CO., Debtor,)	
Petitioner,)	
v.)	No. 74-1716
)
THE HONORABLE STEPHEN S.)	
CHANDLER, United States District)	
Judge for the Western District)	
of Oklahoma,)	
Respondent.)	

This cause comes on for disposition of the petition for writ of prohibition and mandamus, the responses and briefs and related motions filed, and the petition for rehearing of

[APPENDIX]

petitioner, Globe Construction Company, directed particularly to our Order of December 4, 1974, modifying our original temporary Stay Order of November 25, 1974.

Upon consideration of all pending matters, it is the opinion of the Court that this proceeding is not one suitable for the exercise of our extraordinary jurisdiction under 28 U.S.C.A. § 1651. The jurisdictional questions and various contentions made can be raised on appeal, after thorough presentation in regular proceedings in the district courts and before the Bankruptcy Judge.

Accordingly, it is ORDERED that our temporary Stay Order entered on November 25, 1974, modified on December 4, 1974, be and is vacated, and that the petition and all relief sought herein is denied and this cause is dismissed, without prejudice to the presentation of the claims and contentions asserted herein in further proceedings.

s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

A true copy
Teste
Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

By
(signature illegible)
Deputy Clerk

EXHIBIT "A"

Bond No. 2032411

FORM OF PERFORMANCE BOND

PERFORMANCE BOND

KNOW ALL MEN BY THESE PRESENTS: That we, GLOBE CONSTRUCTION CO., P.O. Box 31227, Hoffman Heights Branch, Aurora, Colorado 80010, as principals, and GENERAL INSURANCE COMPANY OF AMERICA, a corporation organized under the laws of the State Washington, and authorized to transact business in the State of Oklahoma, as Surety, are held and firmly bound unto the Oklahoma City Housing Authority in the penal sum of EIGHT HUNDRED EIGHTY-NINE THOUSAND THREE HUNDRED EIGHTY-EIGHT & NO/100 Dollars (\$889,388.00) lawful money of the United States of America, for the payment of which, well and truly to be made, we bind ourselves and each of us our heirs, executors, administrators, trustees, successors, and assigns, jointly and severally, firmly by these presents.

Dated this 25th day of October, 1972.

The condition of this obligation is such that:

WHEREAS, said principal entered into a written contract with the Oklahoma City Housing Authority dated October 25, 1972, for Remodeling of 132 Dwelling Units Plus a Community Service Social Unit and a Child Day Care Center of Project OKLA 2-1, Will Rogers Courts, Oklahoma City, Oklahoma, all in compliance with the plans and specifications therefore, made a part of said contract, and on file in the office of the Oklahoma City Housing Authority, Oklahoma City, Oklahoma.

NOW THEREFORE, if said Principal shall, in all particulars, well, truly and faithfully perform and abide by said contract, and each and every covenant, condition and

part thereof, and shall fulfill all obligations resting upon said Principal by the terms of said contract, and said specifications; and if said Principal shall promptly pay, or cause to be paid, all labor, materials and/or repairs and all bills for labor performed on said work, whether by sub-contract or otherwise; and if said Principal shall protect and save harmless said Oklahoma City Housing Authority from all loss, damage and expense to life or property suffered or sustained by any person, firm or corporation, caused by said principal or his or its agents, servants, or employees in the construction of said work, or by or in consequence of any negligence, carelessness or misconduct in guarding and protecting the same, or from any act of omission of said Principal or his or its agents, servants, or employees and if said Principal shall protect and save the Oklahoma City Housing Authority harmless from all suits and claims of infringement or alleged infringement or patent rights or processes; and if said Principal shall pay or cause to be paid to the Oklahoma City Housing Authority, all damages, loss and expense which may result by reason of defective materials and/or workmanship in connection with said work, occurring within a period of one year from and after acceptance of said project by the Oklahoma City Housing Authority; and if said Principal shall save and hold the Oklahoma City Housing Authority harmless from all damages, loss and expense occasioned by or resulting from any failure whatsoever of said Principal, then this obligation shall be null and void; otherwise to be and remain in full force and effect.

If the Principal shall fail or neglect to pay any person, firm, or corporation for labor, materials, and/or repairs used on said work, or materials employed or used by said Principal in performing said contract, within thirty (30) days after the same becomes due and payable, any such person, firm or corporation entitled thereto may sue and recover on this bond, the amount so due and unpaid.

[APPENDIX]

And it is further expressly agreed and understood by the parties hereto, that no changes or alterations in said contract and no deviations from the plan or mode of procedure herein fixed, shall have the effect of releasing the sureties, or any of them from the obligations of this bond.

IN TESTIMONY WHEREOF, the said Principal has caused these presents to be executed in its name and its corporate seal to be hereunto affixed by its duly authorized offices and the said Surety has caused these presents to be executed in its name, and its corporate seal to be hereunto affixed by its Attorney-in-Fact, duly authorized so to do, the day and year first above written.

(SEAL)

GLOBE CONSTRUCTION CO.

By: (s) *G. K. Ward*Owner, Partner, Vice-President
Principal

ATTEST:

By: (s) *Hazel L. Ward*AHOMA COUNTERSIGNING
RESIDENT AGENTBy: (s) *Darell Strait*

Darell Strait

R. M. Siegfried Company

P.O. Box 3308

Tulsa, Oklahoma 74101

GENERAL INSURANCE
COMPANY OF AMERICA
Surety Company

By: (s) *Robert P. Deering, Jr.*

Robert P. Deering, Jr.

Attorney-in-Fact, Surety

1001 Lincoln

Denver, Colorado

[APPENDIX]

The rate of premium on this bond is \$7.50 for the First \$100,000.00, \$5.25 thereafter per thousand. The total amount of premium charged is \$4,894.00.

(Accompany this bond with Attorney-in-Fact's Authority from the Surety Company certified to include the date of the bond.)

CERTIFICATE AS TO CORPORATE PRINCIPAL

I, *Hazel L. Ward*, certify that I am the *Secretary and Treasurer* of the corporation named as Principal in the within bond; that *G. K. Ward*, who signed the said bond on behalf of the Principal was then *President* of said corporation; that I know his signature, and his signature thereto is genuine; and that said bond was duly signed, sealed, and attested to for and in behalf of said corporation by authority of its governing body.

(s) *Hazel L. Ward*

(Corporate Seal)

FILED
JUN 15 1978
HERBERT T. HOPE
CLERK, U. S. DISTRICT COURT
BY _____
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

GLOBE CONSTRUCTION COMPANY,)
Plaintiff,)
vs.) No. CIV-73-641-C
OKLAHOMA CITY HOUSING)
AUTHORITY, et al.,)
Defendants.)

JUDGMENT

This cause comes on for hearing this 6th day of June, 1978, the plaintiff appearing by its attorneys of record, Judson S. Woodruff and John N. Hermes, and the defendant, Oklahoma City Housing Authority appears by its attorney of record, William B. Rogers, upon the motion of the defendant Oklahoma City Housing Authority for judgment as against the plaintiff for punitive damages in the amount of \$250,000.00; and the Court having heard the arguments of counsel, reviewed the briefs submitted by the parties, and being fully advised as to the history of these proceedings, finds that the plaintiff Globe Construction Company is collaterally estopped to deny the existence of facts heretofore judicially determined, and resulting in judgment against the plaintiff's Surety, General Insurance Company of America on the 30th day of April, 1975. The Court specifically finds that, essential to the Judgment rendered herein the 30th day of April, 1975, were findings of fact that the plaintiff Globe Construction Company fraudulently induced the defendant Oklahoma City Housing Authority

to enter into the construction contract involved herein thus perpetrating a fraud upon such defendant for which it is entitled to recover punitive damages, actual damages having been recovered as against the plaintiff's Surety on April 30, 1975.

The Court further finds that the Bankruptcy Court sitting in the United States District Court for the District of Colorado, in attempting to adjudicate the claim of the Oklahoma City Housing Authority as against the plaintiff Globe Construction Company in Case No. 74-B-3023 did so in complete disregard of this Court's findings entered the 4th day of October, 1974; that the purported disposition of the claim of the Oklahoma City Housing Authority on its merits was erroneous and should be and is hereby set aside.

The Court further finds that discharge of Globe Construction Company from its debts in said proceeding for an arrangement under Chapter XI of the Bankruptcy Act did not discharge the claim of the Oklahoma City Housing Authority.

The Court further finds that the purported Release of Judgment by the defendant, Oklahoma City Housing Authority, was without force or effect, the same being intended by the parties as a vacation of such void judgment which should not prejudice the right of the defendant to proceed on the merits of its claim.

The Court further finds that the claim of the Oklahoma City Housing Authority is not barred by the applicable Statute of Limitations.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the defendant Oklahoma City Housing Authority have and recover judgment against the plaintiff, Globe Construction Company, in the amount of \$250,000.00 as punitive damages for fraud perpetrated by

the plaintiff against said defendant, and for costs expended herein.

DATED this 13th day of June, 1978.

STEPHEN S. CHANDLER
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET ON
JUN 15 1978

ATTEST: A true copy of the original
Herbert T. Hope, Clerk
By (s) Vicki L. Clary
Deputy

APPROVED AS TO FORM:

(s) *John N. Hermes*

Judson S. Woodruff
John N. Hermes
Attorneys for plaintiff,
Globe Construction Company

(s) *William B. Rogers*

William B. Rogers
Attorney for defendant,
Oklahoma City Housing Authority

Supreme Court, U.S.
FILED

JUL 19 1978

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1808

GENERAL INSURANCE COMPANY OF AMERICA,
Petitioner,

VERSUS

OKLAHOMA CITY HOUSING AUTHORITY,
Respondent.

**BRIEF IN OPPOSITION
TO
PETITION FOR CERTIORARI**

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July, 1978

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In the
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1808

GENERAL INSURANCE COMPANY OF AMERICA,

Petitioner,

VERSUS

OKLAHOMA CITY HOUSING AUTHORITY,

Respondent.

**BRIEF IN OPPOSITION
TO
PETITION FOR CERTIORARI**

QUESTIONS PRESENTED

Respondent cannot agree that "Questions Presented" appearing on pages 2 and 3 of the Petition for Writ of Certiorari are in fact at issue:

1. There are no "contract balances" involved, and therefore no property of the bankrupt was or is in dispute.
2. In the proceedings which are the subject of this Petition, the liability of the bankrupt was not determined, only the liability of the bankrupt's performance bond surety.
3. The credit to which a surety might be entitled for work performed by its principal is not established, and, indeed, under applicable law, no such credit exists.

4. Petitioner was granted ample opportunity to prepare its defense, as will more fully appear.
5. Question 5 appears fairly presented.

STATUTORY PROVISIONS INVOLVED

Respondent has no argument with the quotations from the United States Constitution, the Bankruptcy Act and Rules, the Federal Rules of Civil Procedure, or the Oklahoma Statutes appearing in pages 3 and 4 of the Petition; their application to the controversy here is difficult to conceive.

STATEMENT OF THE CASE

Cognizant of the provisions of U.S. Sup.Ct. Rule 40 3, Respondent feels compelled to provide the Court with an accurate summary of the controversy:

Globe Construction Company, Petitioner's performance-bonded principal, was awarded the prime contract for remodeling of the Oklahoma City Housing Authority's Will Rogers Courts public housing project in Oklahoma City, Oklahoma, under contract dated October 25, 1972. Work was to be completed within 180 days. Pursuant to contractual proviso, the Authority terminated the construction contract effective September 19, 1973, for failure of the contractor to perform according to the contract terms, as will be particularized in argument which follows.

Globe invoked the diversity jurisdiction of the Western District of Oklahoma, the Honorable Stephen S. Chandler presiding, as against the Authority for wrongful termina-

tion of the contract, for extra work and materials it allegedly provided and performed outside the scope of the contract, and as against its subcontractors for failure of performance on their part. The contractor's surety, petitioner here, was made a party to the action on its performance bond, and was represented by counsel for Globe until substitute counsel was retained following several days of trial, and during a period of continuance.

During the course of the proceedings, Globe filed for relief under Chapter XI of the Bankruptcy Act, following which the proceedings were conducted as against the surety only (petitioner here) in view of stay provisions and orders issued by the District Court for the District of Colorado pursuant to plenary jurisdiction.

Judgment rendered against the bankrupt after the filing of the Chapter XI proceedings was subsequently, by agreement of the parties, released, and is not at issue here. In addition, judgment rendered on June 6, 1978, as against the contractor for punitive damages arising from the contractor's fraud is the subject of an appeal pending in the United States Court of Appeals for the 10th Circuit, and again, is not at issue here.

In exhaustive Findings of Fact and Conclusions of Law, the trial court found, *inter alia*, that Globe fraudulently induced the Authority to execute the construction contract, and that it breached the construction contract in fifteen particulars. Accordingly, judgment was rendered against the surety and in favor of the Authority for liquidated damages as provided in the construction contract, the court specifically finding that assessment of actual

damages was extremely difficult, and that the liquidated damages assessed were not on the face of the contract disproportionate to probable loss. Costs of the action, including reasonable attorney's fees, after hearing as to amount, were taxed against General.

Petitioner sought rehearing in the Court of Appeals, the same having been denied on March 23, 1978.

CONSIDERATION GOVERNING REVIEW ON CERTIORARI

U.S. Sup.Ct. Rule 19 1(b) suggests the criteria considered by the Court in determining whether it will exercise its discretionary power to grant a Petition for Writ of Certiorari. Petitioner apparently seeks to invoke that portion of Rule 19 which relates to conflicts between courts of appeal on the same matters; respondent respectfully invites the Court's attention to the opinion of the United States Court of Appeals for the 10th Circuit, page 1 of the Appendix to Petitioner's Brief, and particularly to the following:

"Many of the matters raised by General Insurance on appeal concern what we deem to be questions of fact which were resolved by the trial judge on the basis of conflicting evidence. For example, such matters as fraud in the inducement; waiver of such fraud; latent conditions, defective plans, timely performance; substantial performance; waiver of any right to terminate; reasonable attorney's fees are in reality factual issues, not legal issues. It is of course axiomatic that resolution by a trial judge of controverted issues of fact are not to be overturned by an appellate court unless they are clearly erroneous. In the instant case the trial judge's critical findings of fact are not, in our

view, clearly erroneous. On the contrary, the court's findings are supported by the record and accordingly on appeal must be accepted."

The issues presented here involve merely a dispute with regard to contractual obligations, responsibilities, and performances of the parties. Resolution of such issues by the trier of facts does not constitute either special or important reasons for consideration by this Court.

ARGUMENT

I.

THERE ARE NO CONFLICTING DISTRICT COURT JUDGMENTS INVOLVING PETITIONER

In its enthusiasm to attain review, petitioner urges upon the Court a conflict between four judgments rendered by two different courts upon "identical issues of law and fact." To clarify, the judgments referred to are as follows:

1. Judgment rendered October 3, 1974, in favor of Respondent, Oklahoma City Housing Authority and against the contractor Globe Construction Company, subsequently released by agreement of the parties and not at issue here.
2. Judgment rendered in favor of Respondent, Oklahoma City Housing Authority and against the contractor's surety, Petitioner here, on April 30, 1975, the subject of an appeal to the United States Court of Appeals to the 10th Circuit, affirmed January 13, 1978, rehearing denied, March 23, 1978, which is the only judgment concerning which petitioner seeks review.

3. Judgment rendered June 6, 1978, in favor of the Oklahoma City Housing Authority and against Globe itself, for punitive damages resulting from Globe's fraud, concerning which petitioner, as the performance bond surety, has no liability and in which, it is assumed, it has no interest. This judgment is, in any event, the subject of a pending appeal to the United States Court of Appeals for the 10th Circuit.
4. Judgment rendered by the Bankruptcy Court on August 11, 1975, disallowing the claim of the Oklahoma City Housing Authority as against the bankrupt, Globe Construction Company, without reference to any claim respondent had or might have as against petitioner, Globe's performance bond surety.

There is no conflict involved here between the decisions of the district courts including the Bankruptcy Court, hereinabove referred to.

II.

JURISDICTION OF A FEDERAL BANKRUPTCY COURT, AND CONFLICTS AS BETWEEN THE COURTS OF APPEALS

Petitioner, citing Remington on Bankruptcy and Collier on Bankruptcy suggests this Court should accept jurisdiction of this issue because of an inconsistency with regard to jurisdiction of a bankruptcy court over property actually in the possession of the bankrupt, or whether such jurisdiction extends to the property of a bankrupt in the hands of third parties. But this controversy, assuming such a controversy exists, has no application to the case at bar. Petitioner appears to rely upon payment by the Authority to the contractor of periodic completion estimates provided by the contractor to indicate the work in question, had, at the time of termination, been 90% completed. It says, in effect, that since the contractor had completed its work and the Authority had retained 10% of the over-all contract price, that 10% figure (\$195,000.00) was the property of the contractor and therefore subject to the jurisdiction of the Bankruptcy Court upon the filing for Chapter XI relief. General's argument is defectively and deceptively spurious, for it assumes factually that Globe had, at the time it was terminated, completed almost 100% of its contractual obligation, and more importantly, that a defrauding contractor may, as a matter of law, nevertheless recover the benefit of his bargain, specifically, his profit under the terms of the fraud-tinged agreement. "Retainage" is provided in § 12, page 10 of 46, General Conditions of the Contract in suit. It provides, in pertinent part that:

"In order to receive partial payments the Contractor shall submit periodical estimates showing the value of

the work performed monthly, based upon the items in the approved breakdown. Such *estimates are subject to correction and revision* as required. In making such partial payments for the work there shall be retained 10% of the *estimate until final completion and acceptance of all such work covered by the Contract* . . .

“Upon completion and acceptance by the Local Authority of all work required hereunder, the amount due the Contractor shall be paid after the Contractor has furnished to the Local Authority a release in satisfactory form. . . .” (Emphasis supplied)

As we can see, General's \$195,000.00 figure is based upon *estimates of completion prepared by Globe*. The evidence is that substantial work had to be re-done, and the record amply demonstrates the contractor's failure to perform in areas too numerous to detail; the trial court's Memorandum Opinion, and the record supporting it lead any logical mind to the inescapable conclusion that Globe failed to perform the contract according to its terms; it did not provide adequate supervision for the completion of the construction project, including the crucial coordination of various subcontracting crafts, it did not provide temporary heat to prevent injury from dampness or cold, it was not familiar with conditions on the job site, it did not complete the work it did attempt in a good and workmanlike manner, it did not provide protection of the work which was open or exposed, and it did not protect the Authority's property from injury or loss during the course of the construction; in short, it did not perform its half of the bargain, and therefore, it did not earn performance of the other half, that is, payment.

This “retainage” did not, as General asserts, belong to Globe, nor was the work “completed” or adjudged by the architect to be satisfactory. Indeed, the underlying purpose for retainage is the guaranty of satisfactory completion of the work.

By no stretch of the imagination can such unearned “retainage” be considered as the property of a debtor in bankruptcy, and any conflict between Messrs. Remington and Collier, whether real or imagined, has no bearing, for there was, in fact, no property of the bankrupt to be considered.

Understandably, petitioner ignores the effect of the perpetration of fraud upon the duties, rights, and responsibilities of the parties. As this Court said in *Smyth v. United States*, 302 U.S. 329, 358, “Fraud vitiates every form of conduct affected by its taint.”, and in Oklahoma, fraud constitutes a complete defense to an action on a contract tainted by the fraud of the moving party. And the defrauded party may retain the benefit it has received and recover damages by reason of the fraudulent misrepresentation of the fraudor. *Jeter v. DeGraff* (Okl.), 219 Pac. 345; 17 C.J.S., Contracts, § 167.

The Authority's entitlement to damages finds support at § 549, Restatement of Torts 2nd, where the measure of damages available to a defrauded contractee is discussed:

“(1) The recipient of a fraudulent misrepresentation is entitled to recover as damages in an action of deceit against the maker the pecuniary loss to him of which the misrepresentation is a legal cause, including

- (a) the difference between the value of what he has received in the transaction and its purchase price or other value given for it; and
- (b) Pecuniary loss suffered otherwise as a consequence of the recipient's reliance upon the misrepresentation.

(2) The recipient of a fraudulent misrepresentation in a business transaction is also entitled to recover additional damages sufficient to give him the benefit of his contract with the maker if these damages are proved with reasonable certainty."

The issue is discussed at Williston on Contracts, 3rd Edition, § 1524, as follows:

"The right of one who has suffered damages by fraudulent representations to bring an action for deceit hardly requires any citation of authorities. In order to maintain such an action where benefit has been received by the plaintiff, it is not necessary that such benefit be returned. The defrauded party may retain this benefit and sue for the damages he has suffered."

See also, Williston on Contracts, 3rd Edition, § 1523; *United Forests Products Co. v. Baxter* (C.A. 8), 452 F.2d 11. In Oklahoma specifically "Fraud will vitiate any contract procured thereby." *State ex rel. Oklahoma Bar Association v. O'Bryan*, 385 P.2d 876.

III.

AMENDMENT TO PLEADINGS AND DUE PROCESS

Petitioner asserts the trial court, permitting respondent to amend its counterclaim at time of trial, denied it due process because due process requires prior notice of all claims and an opportunity to present a defense. While present counsel for General was not a participant at trial, a cursory review of the record discloses that General and Globe were repeatedly offered the opportunity to proffer evidence on the fraud issue, receiving 48 days in continuances in order to foreclose any possible indicia of unfairness or disadvantage. Petitioner's innuendo that federal district courts are interpreting Rule 15(b) F.R.C.P. in a manner violative of due process finds no support in these proceedings. Clearly the allowance of amendments to pleadings in conformity with proof adduced should be generously exercised. Amendments to pleadings should be allowed and continuances granted in order to avoid disadvantageous surprise, Volume III, *Moore's Federal Practice*, § 15.13[2], pages 1011-1012, precisely the procedure followed by the district court. Respondent's request for leave to amend was made in opening statement on July 30, 1974; not until April 30, 1975, almost nine months later, was judgment rendered against General. Petitioner's assertion that due process was denied in rendition of the default judgment against Globe on October 4, 1974, might readily be considered a rather transparent attempt at obfuscation, for that judgment has been released and is without relevance here. Schedule of proceedings, stays, and continuances considered by the Court of Appeals in consideration of the due process issue is as follows:

SCHEDULE OF PROCEEDINGS, STAYS, AND CONTINUANCES

PROCEEDINGS	CONTINUANCES	EXPLANATION
July 30, 31 - August 1, 2, 1974	Originally to August 20, 1974 (18 days)	Request of Appellant, to allow time for preparation to meet the issue of fraudulent inducement.
October 1, 2, 3, 4 & 7, 1974	Then to October 1, 1974 (30 days)	By agreement of counsel, to allow Appellant's new counsel full opportunity to prepare.
November 18 & 25, 1974	To November 18, 1974 (42 days)	By agreement of counsel
February 3, 4, 5, 6, 7, 10, 12, 1975	To December 4, 1974 (16 days)	On Petition for Writ of Prohibition and Mandamus, the Court of Appeals stayed the proceedings until further Order in view of bankruptcy proceeding by the prime contractor. On December 4, 1974, the stay was modified to allow the parties to proceed against the Appellant-Surety. Then on January 31, 1975, it was dissolved.
	To February 3, 1975 (62 days)	Conflicting schedules of Court and Counsel
	February 3, 4, 5, 6, 7, 10, 12, 1975	TOTAL CONTINUANCES TO FEBRUARY 3, 1975—168 DAYS

—12—

—13—

It can thus be readily seen that the trial court and counsel exercised extreme caution to insure no disadvantage would result to petitioner by the permitted amendment.

IV.

APPLICABLE OKLAHOMA LAW

A. LIQUIDATED DAMAGES

As we have seen, Restatement of Torts, Williston on Contracts, *supra*, a defrauded contractor may recover damages under the contract without restoration of any benefits received thereunder. And both General and Globe failed to prove or offer proof of any such benefit accrued. Cases like *Mason v. Continental Supply Company*, 99 Okl. 32, 225 Pac. 381, do not apply because the element of fraud so pervasive here, is notably absent there. Liquidated damages are clearly recoverable under Oklahoma law where provided by contract. 15 O.S. § 215. *Consolidated Flour Mills Co. v. File Brothers Wholesale Grocery* (10 Cir., Okl.), 110 F.2d 926; *Knapp v. Ottinger*, 240 P.2d 1083; *Flour Mills of America, Inc. v. American Steel Building Co.* (Okl.), 449 P.2d 861. And see *Jeter v. DeGraff* (Okl.), 219 Pac. 345.

And the contract provision under which the district court awarded liquidated damages provides for their calculation to the date of the completion of the work:

“ . . . if the contractor fails to complete the work within the time specified . . . then the contractor shall pay to the Local Authority as fixed, agreed and liquidated damages (it being impossible to determine the actual damages occasioned by the delay) for each calendar day of delay, until the work is completed. . . .” (Emphasis added).

B. THE ELEMENT OF FRAUD

Petitioner complains that respondent's claim for fraud must fail because of absence of positive proof it relied upon Globe's fraudulent misrepresentations. The assertion is adequately answered at Section 479 from Restatement of Contracts, where the authors of that treatise state:

"Where fraud or misrepresentation is material with reference to a transaction subsequently entered into by a person deceived thereby, it is assumed in the absence of facts showing to the contrary that it was induced by the fraud or misrepresentation."

See also Williston on Contracts, 3rd Edition, § 1515, to the following effect:

"Where misrepresentations have been made in regard to a material matter and action has been taken, in the absence of evidence showing to the contrary, it will be presumed that the representations were relied on."

C. ATTORNEY'S FEES

This Court held in *Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702, reciting an exception to the usual "American rule" regarding award of attorney's fees that:

"[1, 2] Although the traditional American rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice may so require. Indeed, the power to award such fees 'is part of the original authority of the chancellor to do equity in a particular situation,' *Sprague v Ticonic National Bank*, 307 US 161, 166, 83 L Ed 1184,

59 S Ct 777 (1939), and federal courts do not hesitate to exercise this inherent equitable power whenever 'overriding considerations indicate the need for such a recovery.' *Mills v Electric Auto-Lite Co.*, 396 US 375, 391-392, 24 L Ed 2d 593, 90 S Ct 616 (1970); see *Fleishmann Distilling Corp. v Maier Brewing Co.*, 386 US 714, 718, 18 L Ed 2d 475, 87 S Ct 1404 (1967).

"[3] Thus, it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons.' 6 J. Moore, *Federal Practice* ¶54.77[2], p 1709 (2d ed 1972); see, e. g., *Newman v Piggie Park Enterprises, Inc.*, 390 US 400, 402 n 4, 19 L Ed 2d 1263, 88 S Ct 964 (1968); *Vaughan v Atkinson*, 369 US 527, 8 L Ed 2d 88, 82 S Ct 997 (1962); *Bell v School Bd. of Powhatan County*, 321 F2d 494 (CA4 1963); *Rolax v Atlantic Coast Line R. Co.* 186 F2d 473 (CA4 1951). In this class of cases, the underlying rationale of 'fee shifting' is, of course, punitive, and the essential element in triggering the award of fees is therefore the existence of 'bad faith' on the part of the unsuccessful litigant."

Application of this bad faith-oppressive exception to the traditional American Rule to the litigation at bar can be readily sustained, for the conduct of Globe in obtaining award of the contract by colluding to increase the bids of others, by fraudulently inducing the Authority to execute the contract, by its prosecution of the work involved, and by its and General's conduct of the litigation would appear to fall directly within the context referred to by the Supreme Court.

And, as Mr. Justice Brennan wrote, an award of attorneys' fees rests within the sound discretion of the trial

court and such an award should not be disturbed except in the case of an abuse of that discretion. *Mercantile-Commerce Bank & Trust Co. v. Southeast Arkansas Levee District* (C.A. Ark.), 106 F.2d 966; *Macri v. United States*, 353 F.2d 804.

CONCLUSION

The District Court resolved factual issues, based upon disputed facts and following Oklahoma law, in favor of Respondent. That judgment received extensive review and was affirmed by the Court of Appeals. It should remain undisturbed.

Respectfully submitted,

WILLIAM B. ROGERS

219 Couch Drive
Oklahoma City, Oklahoma 73102

Counsel for Respondent

July, 1978

CERTIFICATE OF MAILING

This is to verify that a true and correct copy of the above and foregoing Brief in Opposition to Petition for Certiorari was mailed this _____ day of July, 1978, to Judson S. Woodruff, Esq., and John N. Hermes, Attorneys-at-Law, 100 Park Avenue Building, Oklahoma City, Okla. 73102.

William B. Rogers

Supreme Court, U.S.
FILED

SEP 8 1978

MICHAEL ROBAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1808

GENERAL INSURANCE COMPANY OF AMERICA,
Petitioner,

VERSUS

OKLAHOMA CITY HOUSING AUTHORITY, ET AL.,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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September, 1978

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In the
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OCTOBER TERM, 1977

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GENERAL INSURANCE COMPANY OF AMERICA,
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OKLAHOMA CITY HOUSING AUTHORITY, ET AL.,
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**REPLY BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

Petitioner, General Insurance Company of America ("General"), submits this Reply Brief pursuant to Supreme Court Rule 24(4) in response to the Brief in Opposition to Petition for Certiorari ("Brief in Opposition") filed by respondent, Oklahoma City Housing Authority ("OCHA"). The abbreviations used in the Petition will be used in this Reply Brief.

ARGUMENT

I.

THE SUPREME COURT MUST RESOLVE THE CONFLICTS AMONG THE COURTS OF APPEALS CONCERNING THE JURISDICTION OF FEDERAL BANKRUPTCY COURTS IN CHAPTER XI PROCEEDINGS.

As shown in General's Petition (pp. 14-18), the Courts of Appeals are squarely in conflict on the issue raised by this application: whether a bankruptcy court (in this case, in Colorado) has exclusive jurisdiction to determine the debtor's (here the contractor, Globe's) claims to unpaid contract balances, including retainage, in the possession of a third party (here the contracting owner, OCHA).

In the instant case, both the Oklahoma District Court and the Colorado Bankruptcy Court purported to exercise jurisdiction over contract balances in OCHA's possession but claimed by Globe, General's principal. The Oklahoma District Court awarded the funds to OCHA; the Colorado Bankruptcy Court awarded the funds to Globe. The resolution of the inconsistent judgments rendered by the Oklahoma and Colorado District Courts depends upon the resolution of the conflict among the Courts of Appeals as to the extent of the exclusive jurisdiction granted federal bankruptcy courts in Chapter XI proceedings. The Supreme Court should grant a writ of certiorari to settle this important question of federal bankruptcy law.

In its Brief in Opposition, OCHA failed to respond to the most important issue presented by General's Petition. OCHA appears to accept that a conflict among the

Courts of Appeals exists on the extent of the exclusive jurisdiction granted bankruptcy courts, but seeks to avoid the application of the conflict to the instant case. The erroneous and superficial arguments raised by OCHA require only brief discussion.

1. **Conflicting District Court Judgments.**

At pages 5-6 of the Brief in Opposition OCHA merely outlines its version of the three judgments entered as between OCHA and Globe and the one judgment entered as between OCHA and General. Because only one of the four judgments was entered directly against General, OCHA concludes that no conflicting district court judgments exist.

OCHA's position is unsupportable. One judgment, founded solely upon the vicarious liability of a surety, may not be isolated and considered without regard to the transactions from which it arose or from the liability of the principal for whom the surety must answer. If Globe is not liable to OCHA, then no liability can be attached to General, which has only derivative liability as surety under Globe's performance bond (Petition, at 22-23, and authorities cited therein). The judgment of the Oklahoma District Court against General under the performance bond necessarily had to be predicated upon a finding of Globe's liability for breach of contract. Directly contrary to the Oklahoma District Court's finding that Globe was liable under its contract with OCHA, the Colorado Bankruptcy Court found that Globe was not so liable.

When considering OCHA's Proof of Claim filed in Globe's Chapter XI proceedings, the Colorado Bankruptcy

Court properly held the judgment underlying the Proof of Claim void because the Oklahoma District Court had been divested of jurisdiction to determine liability of Globe to OCHA when the bankruptcy proceeding was commenced. The Colorado Bankruptcy Court then considered the merits of the claims underlying the void judgment; and because Globe had filed an objection setting forth offsets, the Bankruptcy Court also considered the merits of Globe's counter-claims against OCHA. An evidentiary hearing was conducted after due notice to OCHA which provided ample opportunity to be heard. *OCHA chose not to appear.* After the hearing, the Colorado Bankruptcy Court found that Globe's offsets from the contract balances exceeded OCHA's claims and held that Globe was not liable to OCHA (Petition Appendix, at A-35, A-39). *OCHA did not appeal.*

The Colorado Bankruptcy Court's judgment disallowing (as opposed to discharging) OCHA's claim constituted a complete exoneration of Globe, and therefore an exoneration of Globe's surety, General, as well. As indicated in General's Petition herein, the disallowance of a claim by a bankruptcy court is an adjudication upon the merits of the debt underlying the claim. *Katchen v. Landy*, 382 U.S. 323 (1966) (Petition, at 23). The authorities are unanimous that the disallowance of a claim against the bankrupt-principal (Globe) collaterally estops the creditor (OCHA) from pursuing the disallowed claim against the surety (General). 1B J. MOORE FEDERAL PRACTICE, ¶ 0.419[3-5] (1978); J. MACLACHLIN HANDBOOK OF THE LAW OF BANKRUPTCY 139 (1956); A. STEARNS, THE LAW OF SURETYSHP § 6.43.

The judgments of the two district courts are totally inconsistent as to General. One supports a finding of the surety's liability; the other mandates a finding of no liability. The conflict is clear and absolute; the question is which should control. General has demonstrated in its Petition that although there is a conflict among the Courts of Appeals, the better reasoned view is that the jurisdiction of the Colorado District Court under the Bankruptcy Act was exclusive, and that the judgment of that Court should prevail.

2. Determination of Globe's Liability by the Oklahoma District Court.

OCHA asserts that the Oklahoma District Court determined only the liability of General under the performance bond and not Globe's liability (Brief in Opposition at 1). OCHA's statement is totally inaccurate. The determination of Globe's liability was a necessary precondition for the imposition of liability by the Oklahoma District Court on General, as Globe's surety (Petition, at 22).

The judgment rendered against General by the Oklahoma District Court contains numerous paragraphs of "findings" that Globe breached the contract with OCHA and that Globe committed fraud against OCHA (Petition Appendix, at A-9, A-15 to A-20). Despite its bland assertion at the beginning of its Brief in Opposition that "In the proceedings which are the subject of this Petition, the liability of the bankrupt was not determined" (Brief in Opposition, at 1), throughout the later pages of the same Brief, OCHA unhesitatingly reiterates the purported find-

ings of Globe's alleged wrongdoing by the Oklahoma District Court as "reasons" to uphold the judgment against General (Brief in Opposition, at 3, 4, 8-10, 14-16).

OCHA's attempt to avoid the jurisdictional conflict between the Oklahoma and Colorado District Courts on the basis that the liability of Globe to OCHA was not determined by the Oklahoma District Court is unsupported in fact and law.

3. Jurisdiction of the Bankruptcy Court in Chapter XI Proceedings.

At pages 7-10 of its Brief in Opposition, OCHA attempts to avoid the jurisdictional dispute involving the Chapter XI proceedings by asserting that there were no contract balances against which Globe could make a claim, and hence over which the Bankruptcy Court could exercise jurisdiction. OCHA does not, however, deny that \$195,000.00 was withheld as retainage from the payments to Globe for work completed; nor does OCHA deny that it submitted a claim in the Colorado District Court, and thus submitted itself to the jurisdiction of the Bankruptcy Court. OCHA further fails to deny the extent of the Colorado District Court's jurisdiction under the Bankruptcy Act.

OCHA's contention that it was not required to pay the contract balances to Globe is founded upon the Oklahoma District Court proceedings *subsequent to October 3, 1974, the date that exclusive jurisdiction over Globe's estate vested in the Colorado Bankruptcy Court.*

It has been and remains General's position that after October 3, 1974, the Oklahoma District Court had no jurisdiction to make any determination concerning Globe's estate, including any determination of Globe's rights to contract balances. Both the spirit and the language of the Bankruptcy Act plainly require that those matters be decided and administered solely in the bankruptcy proceedings.

Subsequent to the filing of Globe's bankruptcy, the Colorado Bankruptcy Court constituted the only forum for the determination of the validity, if any, of OCHA's claimed defenses of fraud and breach of contract to OCHA's otherwise clear contractual obligation to pay the contract balances to Globe. Hence, unless certiorari is granted by this Court, General's derivative right to set off the contract balances awarded Globe in the bankruptcy proceedings against amounts otherwise owed by General to OCHA will be totally lost through the wrongful exercise of jurisdiction by the Oklahoma District Court.

OCHA's argument that no contract balances are due Globe, and therefore none are available as credits to General, simply begs the question. OCHA contends that the contract balances do not exist because the Oklahoma District Court awarded them as a forfeiture to OCHA. The argument assumes that the Oklahoma District Court had jurisdiction over the contract balances and ignores the very issue raised by this Petition that the exercise of jurisdiction by the Oklahoma District Court conflicted with the exclusive jurisdiction of the Colorado Bankruptcy Court to determine the validity of Globe's claims to the contract balances (Petition, at 19-24).

None of the arguments of OCHA refute the fact that General's liability to OCHA in the instant action depends upon whether the exclusive jurisdiction vested in the Bankruptcy Court over Globe's claims to contract balances. If the Colorado Bankruptcy Court had exclusive jurisdiction to determine Globe's rights to the contract balances, then the awarding of the contract balances to OCHA by the Oklahoma District Court is null and void. Because the contract balances exceed the liability of General to OCHA, General will be completely exonerated from liability to OCHA.

* * *

OCHA does not and cannot contest the fact that Chapter XI proceedings are the most commonly used debtor rehabilitative vehicle (Petition, at 13-14). The rapid growth of the use of Chapter XI proceedings increases the risk of inconsistent assertions of jurisdiction by different federal courts in the future.

The conflict among the Courts of Appeals over the extent of jurisdiction of bankruptcy courts over property of the debtor (REMINGTON Possession Theory vs. COLLIER Ownership Theory) is squarely presented by General's appeal (Petition, at 14-18). The exoneration of General from liability to OCHA depends upon whether the REMINGTON or COLLIER position is adopted. General's Petition provides an excellent opportunity for the Supreme Court to resolve the conflict among the circuits because resolution of the conflict is determinative of the outcome of the instant litigation.

II.

THE DECISION OF THE TENTH CIRCUIT EXTENDS THE LIABILITY OF GENERAL BEYOND THE TERMS OF THE HUD PERFORMANCE BOND CONTRARY TO APPLICABLE LAW.

In its Brief in Opposition, OCHA fails to respond to General's position that the judgment of the Oklahoma District Court, affirmed by the Tenth Circuit, impermissibly expands the liability of General beyond the terms of the HUD performance bond. The performance bond does not indemnify fraud by Globe. OCHA does not contend that it does. However, OCHA does not even consider the claim that denial to General of credit for the contract balances because of purported fraud by Globe is tantamount to requiring General to indemnify the fraud of Globe. Nor does OCHA address itself to Petitioner's contention that awarding OCHA attorney's fees against General based upon "bad faith" and "oppressive conduct" of Globe also unlawfully extends General's liability under the performance bond.

OCHA's response to General's position that the decision of the Tenth Circuit expands General's contractual liability ignores the different standards of liability applicable to General and to Globe, but instead simply states that the fraud of Globe "vitiates" its contract with OCHA (Brief in Opposition, at 10). OCHA merely cites authorities that refer to a general cause of action for fraud. The underlying assumption is that the liability of General is co-extensive with the liability of Globe. This assumption is false. The liability of General is strictly limited to the express terms of the performance bond, which does not indemnify the fraud of Globe (Petition, at 26-28).

The finding of fraud by Globe is important to OCHA for another reason. OCHA attempts to support its claim for the award of the architect's attorneys' fees against General as appropriate under the inherent equitable power of federal courts because of the "bad faith" and "oppressive conduct" of Globe. This argument again assumes that the liability of General is co-extensive with the purported fraud of Globe. OCHA again ignores the fact that the liability of General is determined by the strict terms of the performance bond which does not indemnify against the purported fraud of Globe.

The final response that OCHA makes to General's claim that its liability for fraud was impermissibly expanded is that credit for contract balances was not denied to General because of fraud by Globe but because the balances were expended in completing and correcting Globe's work (Brief in Opposition, at 7-8). This novel interpretation of the judgment below is totally unsupported by the record. The judgment recovered by OCHA was for *liquidated damages for delay*. OCHA's claims to the retainage as actual costs of completion is inconsistent with the claim to the judgment against General for liquidated damages. OCHA seeks both actual and liquidated damages—a double recovery against General.

The Supreme Court must not permit the standard HUD performance bond that is currently in use throughout the United States to be erroneously interpreted so as to increase radically the liability of construction sureties.

CONCLUSION

General relies upon its Petition to refute OCHA's response to the remaining issues raised by the Petition that are not addressed above.

General urges the Supreme Court to resolve the unsettled question of Federal Bankruptcy Law raised by the Petition in order to avoid future waste of judicial resources. In the instant case, Globe and General have attempted to avoid the potential injustice, waste and conflict involved in having different courts resolve identical issues. General and Globe were required to litigate in two forums, seek interlocutory orders and even take an interlocutory appeal, as well as a subsequent appeal on the merits. Receiving no relief through these efforts, General has here sought review of this Court to rectify the injustice of having one federal court exonerate the principal (and hence its surety) while another federal court imposes maximum liability on the principal (and its surety). The unjust result of the instant case and future risk of needless litigation may only be averted by granting General's Petition for Writ of Certiorari to resolve the disputed central issue of bankruptcy law.

General respectfully requests that the Supreme Court issue a Writ of Certiorari to review the decision of the Tenth Circuit on the extent of the jurisdiction of federal

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bankruptcy courts in Chapter XI proceedings and on the other issues raised by the Petition.

Respectfully submitted,

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